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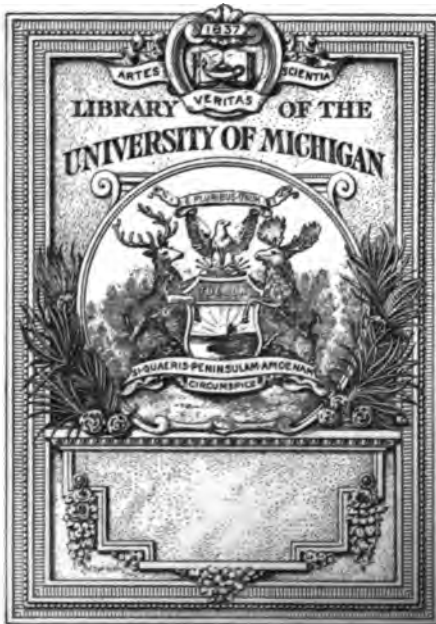
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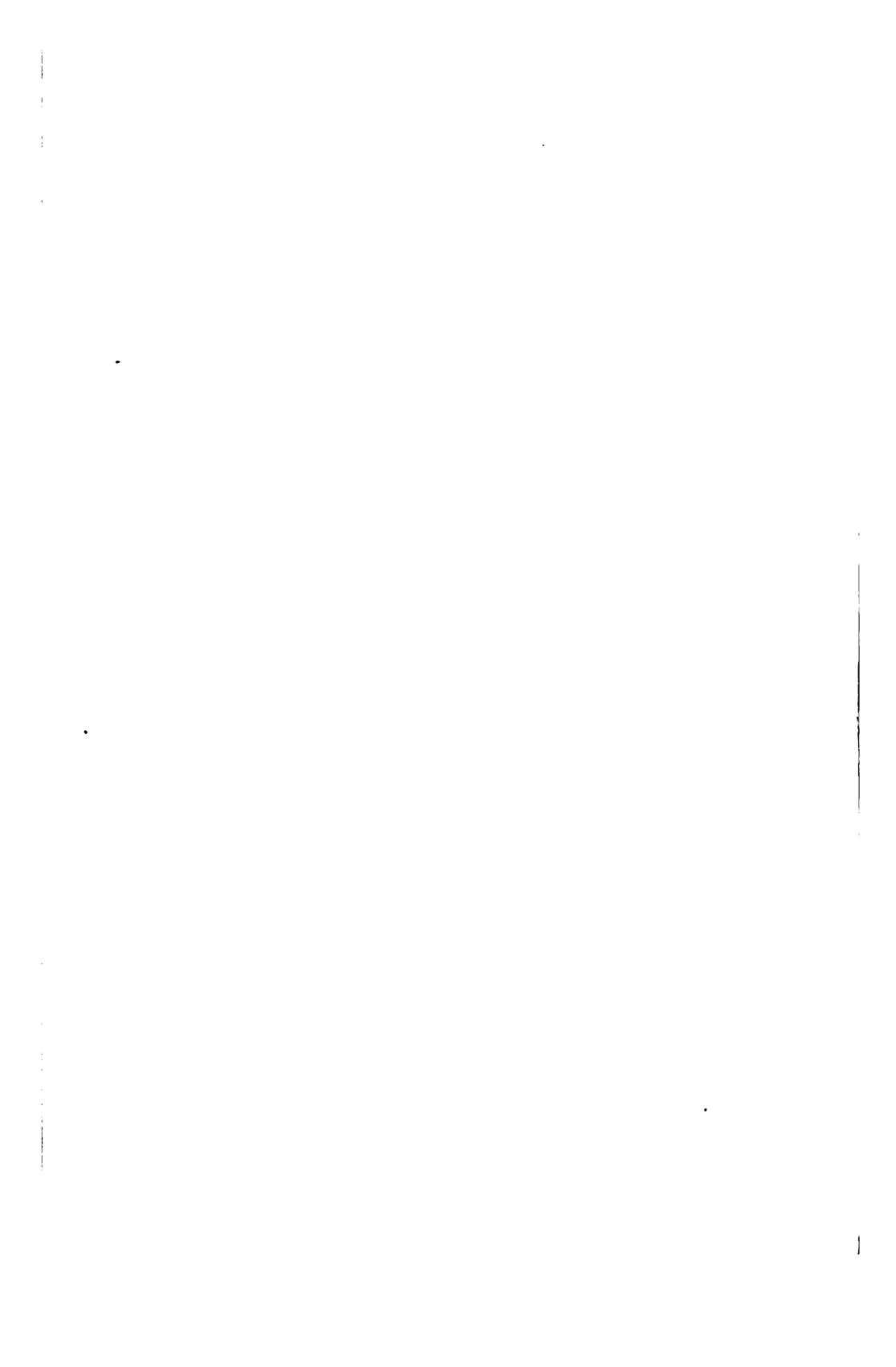
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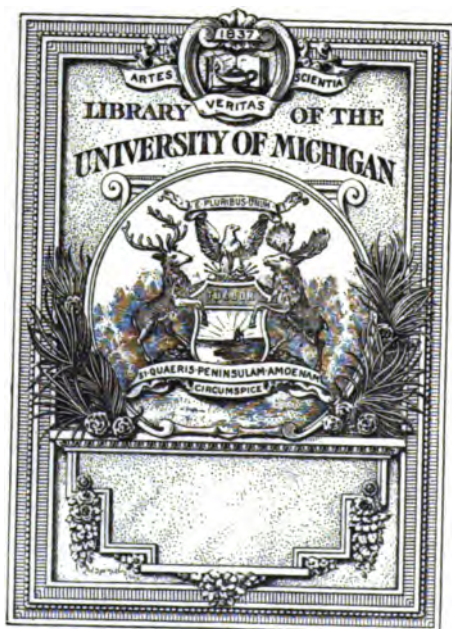






# **INTERNATIONAL LAW**





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## PREFACE

SINCE the Hague Conference of 1907 it has become increasingly evident that the nineteenth-century conceptions of International Law must be revised. Independence is rivalled by Interdependence.

The process of change will need every care in adjustment if it is not to occasion bitterness. This small book is meant to contribute towards that end by elucidating the true extent to which Interdependence has really established itself. It is meant further to indicate tentatively the lines on which change is proceeding. Chapters I, II, III, IV, V, and VI are broadly concerned with the former matter; chapters VII, VIII, and IX with the latter. Perhaps in these final chapters the writer may be thought to transgress the monition of Schiller :—

Not every one beseemeth it to question  
The far-off high Arcturus : let the pilot  
His eye keep fixed upon the nearest pole-star.

It is, however, hoped that they will be found suggestive.

The acts of Ministers have been criticized with some freedom. It is scarcely necessary to explain that this argues no want of respect for the countries they represented. The United States, for instance, under the enlightened guidance of the Hon. E. Root, appear to have entered on a new path of foreign policy as dignified as it is just. Mr. Root's strictures on the cavalier spirit which has occasionally characterised the diplomacy of his country in South America must be welcome to every advocate of international good relations. Yet they cast

no reflection on his patriotism. It is a pleasure, while speaking of this distinguished statesman, to call attention to his brilliant demonstration<sup>1</sup> of the stringent, yet elastic, force of International Law, which is calculated to carry conviction to the most rigid disciple of the "physical force" school.

The matters dealt with in Chapters IV and V ("Illustration") overlap one another so much that it has been found impossible to classify them in any satisfactory fashion. The incidents are therefore presented in an order roughly chronological. Readers—especially foreign readers—are particularly invited to refer for a classification to the INDEX, which is very full and complete, with numerous cross-references, and will show at a glance what cases have a bearing on any given topic.

I have for some years had the appreciated honour of being one of the Honorary General Secretaries of the International Law Association, but I do not wish even to appear to claim its authority for any of the positions advanced, for which I am entirely and solely responsible.

T. B.

<sup>1</sup> Published by the American Association for International Conciliation.

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# INTERNATIONAL LAW

## CHAPTER I

### ARBITRATION

It may not be amiss, before discussing International Arbitration, to examine shortly various opinions which are held concerning what arbitration is.

Considerable confusion exists in the use of the word. It has been applied indiscriminately to all sorts of proceedings. It may mean the friendly reference of a disputed point by two persons to a third party for his opinion, without any implication that his view will be acted upon, or even accepted ; much less that it will be legally binding between the parties. At the other end of the scale of language, it may mean a process which is to all intents and purposes a trial, indistinguishable from the ordinary process of law except in its euphonious name.<sup>1</sup> Thus the so-called arbitrations under the Lands

<sup>1</sup> Since writing the above, the author is able to point to an instance of the distinction's being emphasized by a foreign jurist—Dr. Illés Hévesi of Pesth (*Report, 25th Conference of the International Law Association*, p. 198). " Dans le cas d'arbitrage forcé, c'est à dire si le tribunal d'arbitrage procédait en vertu d'une loi, comme par exemple nos tribunaux arbitrales du Bourse, on ne peut voir aucune différence entre le jugement judiciaire et un tel sentence, puisque ce tribunal a seulement le nom arbitral, mais il est par la nature des choses un tribunal ordinaire comme les autres tribunaux de l'état."

Clauses Consolidation Acts are conducted before tribunals which are imposed upon the parties—whose *personnel* is in the last resort decided by a government department—and whose decisions will be carried out by the executive. The absurdly named “arbitrations” of the Workmen’s Compensation Acts carry the matter a step further. There, the “arbitrator” is the county court judge, and the procedure is only a slight variant from the trial of any other case.

Between these poles there are many shades of meaning, and it is difficult to assign a common substratum to all the senses in which the term is employed. Sometimes it appears to be a certain informality, which is the characteristic. Sometimes it looks like the consent of the parties; sometimes, their selection of the tribunal. But whichever it may be that is the essential ingredient, we ought to be quite sure which it is, before we talk of applying arbitration to international affairs. Otherwise, we are likely to find ourselves playing with words, and following phosphorescent phrases into quagmires.

There are some writers who fall at once into the ready pit which the Roman lawyers have dugged for them. They assume not only an etymological connexion, but a real similarity in function, between the modern arbitrator and the Roman *arbiter*. The arbitrator, like the *arbiter*, according to them, is distinguished by being bound by no slavish adherence to law. He decides *ex æquo et bono* from the depths of an honest and good conscience, like Selden’s derided Chancellor. Needless to say, the arbitrator and the *arbiter*, unlike in most else, are alike in this, that they neither of them answer such a description. The modern arbitrator can only disregard law, and arrange matters for his employers on a basis of substantial justice, under a very special sort of submission indeed. The ancient *arbiter* was no more entitled to set aside law than a juryman is. He

was nothing more nor less than a special kind of jurymen, appointed in the course of formal process, entrusted with circumscribed duties (namely, to find the facts), imposed upon the parties irrespective of their consent, and formally empowered to decide *ex æquo et bono* only for the purpose of excluding the extreme crudity and harshness of the older process, in which no considerations of common justice were permitted to outweigh the merest technical slips. When the *prætor* began to recognize the new commercial activities of Rome, and to grant actions for their protection, he could not, from their very mutuality, leave these cases to the *arbiter* in the old severe strictness. He instructed him to determine the facts *ex bonâ fide*; but he by no means meant him to disregard the law. A Master in Chancery is not an arbitrator, and never was.

There is certainly this further fact connected with the *arbiter*. He was the subject of a limited choice by the parties themselves. But the choice of some from among an official list of judges is very different from an absolutely free choice. One would not be inclined to describe the Court of Exchequer as arbitrators because litigants had the option to sue either in that court or in those of the Common Pleas or King's Bench. Nor would it be said that a chancery judge before 1875 was an arbitrator because a suitor preferred him to the other vice-chancellors. At the same time, we are now on the track of the true criterion of arbitration. It is not the informality of the process: it is not the repudiation of legal rules: it is not the quadrisyllabic name, that makes the Arbitrator. It is the free choice of the disputants.

A controversy may be on a matter of legal right or it may be on a matter of morality and expediency, as in cases of trade disputes. It may be desired to obtain, in either case, a useful and authoritative opinion; or a morally binding decision; or one which shall be legally

enforceable. (There is nothing inconsistent in the disputants desiring to transmute a moral obligation, if found to exist, into a legally binding one.) In any of these cases, if the matter is referred to a mutually chosen party, either instead of, or in default of the possibility of, a trial in the courts, we have the standard type of arbitration.

It is of the essence of this standard type, that the dispute shall be referred to persons chosen *ad hoc*. A reference to a person whom one has long ago chosen, as one by whose decision one will abide in case of all disputes with a particular individual, is not a genuine arbitration if he is no longer agreeable to the party. It may be that the law will compel the acceptance of his decision: and it may style him "arbitrator," as it styles its county court judges—but that is a very different thing. The essence of an arbitrator is that at the moment of the dispute he is voluntarily selected by the parties as likely to do justice to them both. A bygone consent may bind the disputant, but it cannot alter the facts of human nature. An enforced arbitration is a contradiction in terms. Arbitration is essentially voluntary: and a dead consent is no consent. The "domestic tribunal" which is perpetually being set up by people who contract with insurance companies and builders, may be a perfectly competent and a very effective tribunal. But the persons who create it are giving themselves judges, not arbitrators.

It is not a question of words. It is a substantial question of the greatest importance, whether, when we speak of International Arbitration, we mean to invoke the analogy of a true Arbitration, or whether we are covertly referring to these quasi-arbitrations with which the commercial world is so familiar as alternatives to actions in court—alternatives recognized and enforced by law, independently of the will of the defendant. If A has a dispute with Z and A can get the state to enforce

his claim, it matters very little whether Z has to accept the decision of the ordinary judges, or of some tribunal—say a foreign court, or a private individual—which he has beforehand agreed to accept. In either case it is the state coercion which is at the back of all the proceedings. It is either that the state enforces A's substantive claim against Z, or else that it enforces A's claim for the fulfilment of Z's contract to submit to a "domestic tribunal."

So again in the realm of extra-legal arrangements.

Two friends are arranging to set up house together. They agree that in all questions affecting the joint *ménage*, they will amicably accept the decision of a third friend. Years afterwards, they disagree about the colour of the drawing-room decorations. The one wishes to refer the matter to the friend agreed upon. The other, by this time, has not the least confidence in the taste or judgment of the latter. In these circumstances he may feel bound in honour to abide by the third party's decision. But one cannot say that the proceeding is anything like arbitration. The deciding party is called in entirely against the will of one disputant. This disputant has no confidence in the decision. He will only accept it because he feels in honour bound to carry out his agreement if the other insists on holding him to it. Arbitration means, properly, a reference to a person in whose ability to decide a present question both parties have a present confidence. It is this principle which lies at the root of the Scottish rule that the law will not enforce a contract to arbitrate, unless the parties have agreed to a named arbitrator. People obviously cannot have confidence in an unknown quantity.

If parties choose a private judge, either because they prefer him to the public judge, or because the public judge is not available, they do not necessarily choose an arbitrator. If they make arrangements for having

a private judge—selected perhaps by lot,<sup>1</sup> or by the accident of occupying a particular post—still less do they necessarily choose an arbitrator.

The modern arbitrator, then, resembles the *arbiter* in little. The latter was a state judge (or juryman): the former is a private judge, and properly speaking, a private judge resorted to *ad hoc*. A private judge dragged in (either with the help of the state or not) in reliance on a prior agreement, against an unwilling defendant, is not an arbitrator but a governor.

To such an extent might this be carried, that an arbitrator might perhaps be considered to cease to be such, even after entering upon his functions, so soon as he lost the confidence of either party. It is unnecessary to lay stress upon this: for it might with equal propriety be held that the acceptance of the arbitrator for the solution of the specific point raised cannot be invalidated by the way in which he proceeds to solve it. Any other course would prevent him from having any real arbitral authority at all, and would convert him into the mere mouthpiece of the parties. At

<sup>1</sup> A singular instance of an attempt to solve the difficulty presented by the tendency of arbitrators to act as advocates is furnished by the *Mermaid* arbitration of 1868. (See the facts of this case, p. 140 *infra*; *Hansard*, 18 March 1869.) A Mixed Commission of four (two naval officers and two lawyers) was appointed, who were to select an umpire:—

“If, however, the Commissioners should not be able to agree upon any such fifth person, the British and Spanish Commissioners shall designate one person for each side, and in case the Commissioners should differ in opinion with regard to any point, it shall then be determined by lot which of the two persons so named shall be the umpire for the decision of that particular point.”

This reference to chance for the selection of an umpire for each question is believed to be unique, though something very like it has long been known in connexion with mixed commissions for the assessment of damages: *e.g.* the Franco-British of 1815, where it was arranged that if the arbitral commissioners differed, the question itself should be decided by lot (*Hertslet: Treaties*, I. 293).

the same time, it has a real connexion with the well-known rule, that the misconduct of an arbitrator vitiates his award.

So far we have spoken of the authority of the arbitrator in point of time. Incidentally we have mentioned the necessity of the arbitrator's being a definite person. An arbitrator appointed by reference to an office is virtually a named person, if the arbitration is *in rem controversam*. If, again, the reference is merely to a person to be chosen by lot, or by a third party, from a list of acceptable persons, the arbitral character of the proceedings would not appear to be affected in principle.

But when the reference is not *in rem controversam*—when it is a prospective reference of disputes to persons who are not in the minds of the contracting parties at all, but are merely left to be ascertained in some way or another at the time when disputes shall arise—it is clear that not even at the time the stipulation was made can the contracting parties have had any real confidence in the tribunal they set up, when neither the facts of the dispute nor the personality of the judge can be known.<sup>1</sup>

In short, to have an arbitration of the standard type, the three unities must concur—time, personality and consent. For each question, as it arises for decision, a definite arbitrator must be freely accepted. Anything short of this may be process ; but it is not arbitration. At any rate, it is not the same sort of arbitration. So much will be universally accepted.

Therefore, when we speak of introducing arbitration between nations we must be careful what we mean. If we mean to introduce arbitration of the enforced kind with which we are familiar at the English Bar as a more or less faintly disguised substitute for a commonplace legal trial, then we mean to subject nations to a law-court. If we mean to introduce the sort of arbi-

<sup>1</sup> Except perhaps in the single case where the main duty of the arbitrators is to find a conciliator.



tration by which a person commits himself in advance to accept the future opinion in future disputes of somebody who may or may not be named at the time, we are subjecting nations to their dead selves. If we mean merely to facilitate the sort of arbitration which is freely accepted on each occasion by the disputants, then and then only have we a right to say we are preserving and fostering true International Arbitration.

Otherwise, under the specious name of arbitration, we are placing nations under a common sovereign.

It is true that, just as the term "arbitration" is loosely used to mean any alternative for ordinary legal process (self-help excepted), so the same term is used to mean any peaceful substitute for war as a means of settling international differences. It must be recognized, however, that there is a considerable difference between the acceptance of a *persona grata* to decide a particular dispute, and a binding agreement to refer all disputes whatever to a tribunal of shifting composition. The one is freedom and sovereignty: the other is subordination.

Does this imply that, if we restrict "arbitration" to its proper sense, "obligatory" arbitration is impossible? By no means. "*Nemo cogitur ad impossibile*": but it ought never to be impossible for two nations to settle their differences without resort to arms. It ought never to be impossible for two nations to fail to discover one (or even half a dozen) honest and competent men to pronounce between them. A nation cannot answer for its sentiments ten years or twenty years hence: and we have said that its free acceptance of the arbitrator is essential to a true arbitration. But, though one may not wish to submit a dispute to arbitration at all, it is none the less a true arbitration which arises, if the essential requirement is fulfilled of a free choice of arbitrators. In other words, a nation may quite well bind itself to discover a person in

whom it has confidence to come to a decision in case of dispute with another. And this is obligatory arbitration.

It is in this direction that the most hopeful prospects of the universal adoption of arbitration as a substitute for war lie. The endeavour to induce nations to accept beforehand a cut-and-dried set of arbitrators, or, still worse, a bench of arbitrators of fluctuating composition and uncertain attainments, is doomed to absolute failure. Nations will not, even to avoid war, jump at any assortment of arbitrators that is recommended to them by an assembly of diplomatists in Holland. It is hopeless to expect or fancy it. In the first glimmerings of social history, inquirers have thought that they detected the independent disputants on the highway calling in the wisdom of the passing *vir pietate gravis* as an arbitrator between them. Can we fancy those primæval litigants finding it an easy thing in consequence to submit themselves formally to the jurisdiction of one man, be he never so pious, upon any and every occasion?—or to a select committee? Such submissions are the slow growth of ages.

The fantastic projects for the composition of international courts, with nicely regulated stations of full judges and deputy-judges, of first-rate and of fifth-rate powers,—the glittering proposal that emanated from North America, and obtained applause from the short-sighted, of a “Supreme Court of the World,” which in theory enthroned Law above the nations, and in practice would have conferred that eminence on a board of respectable middle-aged gentlemen—these can only meet with the fate of the Grand Design. They will form suitable material for undergraduates’ essays in Political Science. No such cut-and-dried scheme could seriously be propounded by any one for whom history was more than the old almanac of proverbial philosophy. And it is not necessary that any such chimerical proposal should be recommended or adopted.

If such a plan were to be carried out by conventions, on what would the permanence and authority of the new state of things rest? On the force of world-wide opinion which constrains the observance of treaties—and on nothing more or less. If, instead, a simple pledge for the reference of all disputed questions to arbitration were entered into by convention, on what slenderer foundation would its authority depend? The force of the simpler and freer agreement would be precisely that of the more artificial and inelastic one. Indeed, its moral force, as distinguished from its legal force, would be greater: for the more fair and liberal an agreement is, the more will public opinion condemn its breach. Instead, therefore, of painfully elaborating the plan of a court which is designed to satisfy everybody and which actually satisfies nobody, let the advocates of obligatory arbitration devote their energies to getting the simple principle of arbitration acknowledged as the necessary substitute for war. Without complicating the matter by asking nations to tie themselves down to any particular procedure or persons, which is hopeless, let them persuade the world that war is an anachronism, and that the decision of fair and sensible arbitrators is a thing which no self-respecting people need be ashamed to invoke or comply with. A great deal would be gained if it were even to be recognized as obligatory that arbitrators should be consulted: even if it were not necessarily obligatory to carry out their judgment. Such a class of arbitration, obligatory in terms, facultative in effect, will probably be found to precede the establishment of completely obligatory arbitrations.

No better or more sensible treaty of this kind has ever been concluded than that arrived at by several of the American Republics in 1890. Its provisions, making the abandonment of war obligatory, but leaving the composition of the arbitrating body perfectly open, reserve from their operation the single question of national

independence, settle elaborately the troublesome points of detail which occur in the practical working of arbitrations, and were framed to last for twenty years. Governments, courts, scientific bodies, officials or even private persons might be designated as arbiters. Unfortunately, the treaty was not ratified: only Central America (except Costa Rica), with Venezuela, Ecuador and Bolivia, remaining ultimately willing to ratify it, though North America, Brazil, Hayti and Uruguay had at first accepted its terms.<sup>1</sup>

There are two objections which may be urged against the idea that the proper immediate objective of the peace advocate ought to be the firm substitution of arbitration in the place of war, without defining its precise modes. The first objection is that if the mode of arbitration is undefined, the original quarrel will merely be complicated with a second quarrel as to the manner in which it ought to be settled. The second is that a nation desirous of refusing justice, or of deciding the event by war, might decline all reasonable proposals for choosing arbitrators. These are real difficulties: and perhaps the best answer to them is that they are inevitable in the nature of the case. If the nations are still so prone to war that they will look without disapproval on one of their number making a peaceful settlement of a given dispute impossible, in defiance of her solemn engagement, it is evident that no scheme of obligatory arbitration, however detailed, is likely to succeed. After all, the force of all such conventions lies in the sentiment of the world. The world is not so easily taken in. At any rate, the diplomatic world is not. And if a country which has agreed in general terms to arbitrate, cannot find a suitable set of arbitrators anywhere on earth which would be fair to herself and to her opponent, the public will not be long in directing upon her exactly the same force of irresistible disapproval

<sup>1</sup> See Evans-Darby, *International Tribunals*, 98.

as if she had refused to carry out an award, or had declined to carry out the terms of a detailed engagement regulating the arbitral procedure and the composition of the tribunal. All that can be said is that the absence of any cut-and-dried scheme makes procrastination a little easier ; makes duplicity a little safer ; makes hectoring a little likelier. It is true, and it may be admitted, that if all that is agreed upon is the principle of obligatory arbitration, the weak and dishonest can, to a certain small extent, haggle and temporize ; that the frank repudiators of their obligations can, for a certain limited time, postpone liquidation ; that the arrogant and strong may be able, with a certain faint show of justice, to put forward mediocre and unacceptable arbitrators, and, refusing to be content with anybody else, cut short arbitration with the sword. The sole and sufficient answer to all these considerations is that no other sort of compulsory arbitration has a chance of general, not to speak of universal acceptance.

It is better that we should have obligatory arbitration in a form which is capable of a little abuse, but which would practically remove to an indefinite distance the risk of war, than that we should do without it from year to year, in the hope of some day securing the recognition of a formal and permanent court, to which nations would agree to submit. There is, besides the immense practical difficulties in the way of the establishment of such a court, a difficulty of theory which expresses a real truth. Municipal courts are composed of individuals dealing normally with the differences of individuals. An international court, to correspond with them, ought, since it deals with the affairs of states, to be composed of states. It is not enough that it should be composed of their representatives. Such are only representatives in a far-fetched and uncertain sense. The government of a nation is its only representative for international purposes. It may delegate a limited

authority to an ambassador. But an ambassador does not embody the majesty of a state, though he may shine with its reflected glory. He is not an agent, but a *nuntius*. His acts always require ratification. So that, even if the members of a tribunal have an ambassadorial character, that is not sufficient to make the court truly a court of states, or of anything but the nominees of states. This does not deprive it of a certain usefulness. But it makes it impossible to regard it as analogous to an ordinary court of justice. There is nothing to decide whether the judges are to be the exponents of their own ideas of law, or of those of their nation. In the early days of International Arbitration, when disputes were referred to sovereigns, the distinction hardly existed. The royal personage to whom the matter was referred, clearly decided it as the representative of his state. Even if, for obvious reasons, he consulted, and adopted the opinion of, a jurist whose eminence commanded respect, it was quite plain that the decision remained his own, and his own as representing his country. Such were the arbitral decisions of Napoleon III. in the Fayal case (1852): of Marshal McMahon in the Delagoa Bay cases (1872): of the King of Prussia in the Portendic case (1843). So, in 1814 the Russian Czar arbitrated between Britain and the States; the King of Holland in 1831 between the same powers; the Queen of Britain between France and Mexico in 1844; the President of Chili between Argentina and Britain in 1845; the King of Holland between France and Spain in 1852. The Belgian King similarly arbitrated in 1863 between Chili and the States, and also between Britain and Brazil; the Queen of Spain arbitrated in 1891 between Colombia and Venezuela; and the Czar in 1891 between France and Holland and in 1875 between Japan and Peru.<sup>1</sup>

However, the fashion grew of referring disputes to

<sup>1</sup> Phillipson, *Studies in International Law*, ch. iii.

jurists rather than to states in the persons of monarchs. The parties did not nominate them themselves, but left it to friendly states to nominate all or some of them. The adoption of this method in the Geneva Arbitration (while it did not contribute to the success of that tribunal) led to its being regarded as the standard method of reference.

Mixed commissions for the assessment of monetary claims had always been more or less employed, and we find them as early as 1654, when a Netherlands-British commission was appointed to assess war-claims.<sup>1</sup> There seems no foundation for the suggestion that such commissions are not arbitrators. It is said that they have a diplomatic rather than a judicial character: but that is the characteristic of all international arbitrations.<sup>2</sup> The great difficulty attending their use was that such commissioners, like arbitrators in compensation cases, are apt to take the rôle of advocates, and to produce a deadlock. The appointment of a fifth private person as umpire became common; and this led gradually to the system, now frequent, of employing private persons as sole arbitrators. Private arbitrators were not, of course, unknown before: Merignhac instances Alciat,<sup>3</sup> as arbitrating on the status of the Italian and German principalities.

A very early but quite unique reference of all disputes whatever between French subjects and Swiss to a mixed commission occurs in 1516 in the treaty between France and the Swiss Confederation. It provided for the choice of a private umpire, nominated by the demandant.<sup>4</sup>

The Parliament of Paris used in mediæval times to be applied to for decisions, and a striking case occurred in 1879, when a dispute between France and Nicaragua

<sup>1</sup> Phillipson, *Studies in International Law*, iii. 19.

<sup>2</sup> Pradier-Fodéré, *Cours de Droit diplomatique*, ii. 573.

<sup>3</sup> *L'Arbitrage international*, § 39.

<sup>4</sup> *Ib.* § 42.

was referred to the French Cour de Cassation, which directed Nicaragua to pay 40,320 frs., interest at 12 per cent. and costs: not an encouraging precedent.<sup>1</sup>

But the historic case of reference to private persons (designated, no doubt, by sovereigns) is the Geneva case of 1872. Others followed rapidly. A difficulty between Denmark and the U.S.A. was referred in 1888 to the British Minister at Athens (Monson): and a friendly difficulty between Britain and Germany was referred in 1889 to Baron de Lambermont.<sup>1</sup> The Behring Sea and the North Sea Trawlers cases are as well known as the Geneva one.

A reference conducted in such a way as were the Geneva and similar cases, is not typical Arbitration. For the disputants have their difference decided, not by the persons whom they choose, but by the persons whom their nominees choose, unless, as is now increasingly the case, they refer their dispute to a named jurist. And the anomaly reaches further. For, when they purport to refer the matter to the decision of a person to be appointed by a particular Power, the question at once arises, Is the person appointed in such a way to act as the mouthpiece of the particular Power, or on his own authority and responsibility? Is he to take instructions from it, as the real Arbitrator, or is he to resent them as interferences with his arbitral commission? It is a technical and jejune answer to say that, if he is a subject of that Power, he must accept the instructions of its government. It may not be true, constitutionally speaking. Were it true, it does not affect third parties. They have agreed to accept the decision of a person, not that of his government.

But the full bearing of this consideration is seen when we remember that it is precisely such an anomalous tribunal as this which the advocates of a Supra-National Court would set up. It would fail to resemble a municipal

<sup>1</sup> Merignhac, *L'Arbitrage international*, § 110.



court at all ; because its judges would not be certain to express their own personal conviction as to the points in dispute. They might do so : they might express their official national view : they might express a compromise view. But no one could tell which.

Can we expect states to agree to such a system ? A haphazard arrangement, under which they may expect to get the decision of a competent jurist, and are favoured with that of a party politician,—under which, conversely, states may expect to receive the deliberate opinion of an important government, and actually get that of a doctrinaire professor—is very far from likely to prove a workable machine.

Mr. A. Merignhac,<sup>1</sup> approving the views in this regard of Fiore and D. D. Field, says that—" il faut préférer des juges nommés pour chaque affaire, des *jurés* en un mot."

Let us pause to take account of the facts apparent. The more ardently one advocates and desires peace, the more careful one is impelled to be, that it shall not be imperilled by the instalment of a flimsy and evanescent substitute for war. It has been shown that what is usually termed Arbitration as a means of settling the disputes of nations is not true, spontaneous Arbitration, and is not invested with its merits. It resembles rather the action of an irresponsible court which self-respecting nations are not likely to accept, and whose judges are ambiguous personages, with one eye on the law and another on their governments.

And a far greater hope of lasting success in promoting the triumph of peace lies in the gradual formation of a public conscience trained to consider war a crime and arbitration a necessity. The acceptance of the abstract idea of arbitration—not as a pious opinion, but as a vital necessity which it is for each nation concerned to translate into practical action—is the one thing needful. It is useless, because it is manifestly absurd, to expect

<sup>1</sup> *L'Arbitrage international*, § 461.

every one to accept any set of publicists whatever as necessarily qualified to pronounce on all affairs.

Such voluntary arbitration is plainly free from all the objections which have been forcibly urged to the plans of permanent "arbitration" boards which are here deprecated. Nations have said, and rightly said, that the answer to questions affecting their honour, independence and vital interests cannot be made dependent on the decision of such bodies. There is manifest danger, and some loss of consideration, involved in undertaking for all time to accept the decision on these matters of a court the composition of which is beyond one's power to alter. But to refer such delicate affairs to the resolution of a mutual friend, in whom both parties can confide, is precisely the right and sensible way of dealing with them. When two individuals are at issue on a point of honour, what more natural and appropriate way out of the difficulty is to be found than a reference to a sagacious and experienced friend of both parties? Genuine arbitration is a serious rival to war. Supra-national courts only excite apprehension.

In the *Naval Annual* for 1908, Sir Fredk. Pollock makes a somewhat disturbing comment on the Equality of States. He is, like many other observers, struck by the fact that the smallest atomic state formed, at the recent Hague Conference, an absolute obstacle to the adoption of any new rule of law by the assembled body. That, though a striking demonstration enough, is merely a consequence of national independence. No state, or body of states, can impose its will on another. A wine-glass is as truly full as a fountain is full. To change the law, there must be a consensus of general civilized opinion—it is not enough to show a consensus of cabinets. All that cabinets can do is to make a treaty, and if it is to include them all, it is not surprising that they must be unanimous about it.

National equality means equality of sovereignty, not

equality of resources, power or dignity. That is a commonplace. A wineglass is as full as a fountain, but it is not as capacious. But Sir F. Pollock goes further. He denies to minor states "political" equality, while conceding to them "jural" equality. This amounts to giving them rights which they have no power to preserve. It is the same argument as that which concedes to women "legal" while denying them "political" rights. The very use of political rights is to modify or take away legal rights. Legal rights are insecure and worthless if others alone possess political rights.

Consequently, to restrict the equality of states to such "legal" rights as the major states in the exercise of their supposed "political" rights may think fit to concede, is to abolish the equality of sovereignty which at present subsists, and virtually to abolish the sovereignty of small states altogether. If the majority in number and value of states is to be permitted to enact a general law abolishing (say) fetishism, without regard to the dissent of San Domingo, it is not difficult to see that the independence of San Domingo is gone. It never was so great as the independence of France or Italy, because it affected a lesser area. Within that area its pressure to the square inch of territory was precisely the same. The independence of San Domingo, as of France, was limited by general skilled opinion and tradition. But if France and Italy are to be invested with "political" rights a hundred times stronger than the shreds conceded to San Domingo, national independence and equality become a figment. There is no such accepted theory as that nations are invested with some undefined political rights varying with their size and importance, in virtue of which they can unite to change the known doctrines of international law, or to impose their benevolent will upon others. We do not affect to regret that this should be so. International law will best develop by scientific discussion. It is not a thing to be settled by the debates and divisions

of a mob of diplomats. Sir F. Pollock takes away from states their well-established sovereign equality, and presents them in return with a "jural" equality which is a gift only fit to be rejected with contempt.

An international legislature in which a minor state would have nothing but an ineffectual minority vote, is unthinkable. An international tribunal of a permanent kind would be in effect a legislative body, and would present the same dangers.

Arbitration, moreover, which is obligatory in principle and voluntary in detail has the advantage of being capable of elastic adjustment to meet particular cases. If nations are at issue about a matter of some few hundreds of pounds, they do not want to convoke the leading jurists of the world at an expense of thousands. A reference to one capable independent person is all that is wanted. If they are at issue on a question of law, they do not want the decision of persons inspired by political motives. If their dispute is as to the right and honourable way in which either of them should behave, irrespective of their strict legal rights, then they do not want the decision of dry legal theorists. If their difference is merely about a matter of fact—whether such and such physical occurrences did or did not take place, then they do not want the decision of politicians or lawyers. They want detectives.

There are thus at least three kinds of dispute. They have never been regularly separated, in theory or in practice; and nations have been in the habit of flinging a complicated case into the arms of some jurist or another, to give a general decision on the law, facts and morals of it. And many excellent people are endeavouring to establish courts in which the same short-sighted procedure would be carried on. It would be necessary to refer to these tribunals, indiscriminately, cases which really raise questions of morals and of fact as well as, or instead of, questions of law. They would deal with

them all in a spirit of stiff legalism, unless they entered upon a work for which they are profoundly unfitted, and dictated a fluctuating code of honour to the nations.

But true Arbitration lends itself with perfect elasticity to a more sensible plan. If the disputants are not committed beforehand to any fixed judges, there is no obstacle in the way of their referring it to jurists and skilled examiners to find out separately the law and the facts; and then, if they desire, or find it essential, to refer the whole matter to *personæ gratae*, to pronounce what, given the law and the facts, should in fairness be required by the one party of the other, they have a perfectly clear field for doing so. A normal arbitration between nations would then have three well-marked stages. A simple *commission d'enquête* would first establish the facts. A committee of international jurists (it might be one or it might be twenty in number, according to the importance and difficulty of the subject) would declare the strict law. And a friendly council of rulers or statesmen would recommend the proper thing to be done.

Here it may be well to insert a caution against what is a very real and growing danger to arbitration. That is the importation into the decision of national disputes of the methods of the commonplace advocate. The writer would be the last to deprecate the great profession of the law. But the arts of the advocate are not admirable. The atmosphere of the law-court—of that scramble for verdicts which has so unfavourably impressed the popular imagination—ought sedulously to be eliminated from the solution of international controversies. Something, but not much, will have been gained when we give victory to the hired brains of the advocate instead of to the hired muscles of the soldier. The substitution of a struggle of wits for a struggle of strength is all that will be effected, if we are not very careful indeed, by the triumph of Arbitration.

Let any one who doubts the magnitude of the danger read the full reports of the arbitration on Religious Foundations between the United States of North America and the United States of Mexico. On the one side were astute advocates versed in every turn of the game and every move on the board: on the other, plain, simple men who imagined that it was sufficient to present their case, and not to display their skill in advocating it. All the dexterity and *finesse* of an accomplished pleader was displayed on the one side: the straightforward simplicity of the other was completely outflanked. Take a very much better-known instance—the Alabama arbitration. It was remarked on that occasion that the British representatives showed themselves anxious to establish logical conclusions, whilst those of the United States were above all desirous of capturing the minds of the independent arbitrators. There we have the essential mark of the advocate. His mind is fixed upon case-winning, and he is not careful how the result is accomplished. Chivalry is not always the predominant virtue in a law-court. It ought to be predominant in an International contest. A third example shall be given: it is a tribute to the American genius for law, that it is again concerned with the United States. At the Alaska Boundary arbitration the case of Canada might well have been prejudiced by the aroma of commonplace litigation which was thrown over the proceedings. Not that the Canadian counsel were less able than those of the United States. But in accordance with forensic habits, they were definitely subordinated.

The excessive legalism which drags great international controversies into the sordid and suspicious atmosphere of the law-court, is calculated to do unqualified harm to the cause of Arbitration, and to bring it into dislike and contempt. We are told that just as the armed retainer has been superseded by the policeman, so the soldier is

to be replaced by the international policeman, and we are bidden to regard the prospect with joy. Is it certain that the general admiration for the policeman so exceedingly transcends that accorded to the soldier? So far as our observation goes, the facts are precisely the reverse. Where a mob stones the police, it will cheer the soldiers. For excellent reasons. The policeman, on the whole, does not give his opponent a chance. The soldier, on the whole, does. The policeman is seen in the light of the sacrosanct and irresistible agent of the dead machine of government. The soldier appears as the exponent of the spirit of the country, free among its equal peers. An exponent on the rough physical plane, he may be, and we do not affect to regret his disappearance. Perhaps he may be replaced by voluntary devotees who will resent injuries by declining life on dishonourable terms. But it is a false step to talk of replacing him by the policeman.

People are very much inclined, nowadays, as Mr. G. K. Chesterton has explained at some length, to ride analogies to death. Because Wagner is more complex than Beethoven, and Beethoven than Mozart, we reach the easy conclusion that music must keep getting indefinitely more and more complex, and that superior complexity is the sign of a superior artist. Because political development has in the vast arena of the nation substituted arbitrary bureaucracy for private war, we find the inference ready made, that if the thirty or forty states which we know of give up war, they must necessarily accept a *régime* of police. But, as the late Lord Esher remarked—"If a man talks nonsense once, is he bound to go on talking it all his life?" Nature is not bound to repeat her mistakes. Even if the analogy were complete, this would still be true.

The truth is, we have no analogy to go by. We have no experience of a small number of independent organisms forming a mutual organization for the abolition of strife ;

and we do not know in the least on what lines of crystallization such an organization would proceed. Certainly there is no presumption that it must be on lines at all like those which have produced our modern governments—and anarchists.

Elastic arbitration at least relieves the nations from the prospect of being lawyer-ridden.

As for war, it will never be abolished until the sentiment of the world regards even a just war with abhorrence. No one would be prepared to succeed in a fight by the use of an unfair blow. It is recognized that it is better, to permit wrong to be done : to sustain any insult : to witness any crime. When nations have so far become civilized that people will meet armed force with the proud calm of the old Roman who disdained to struggle with the barbarian, then war will have become impossible. Meanwhile, the unregenerate nations that are not as yet averse from the thought of defending themselves by the infliction of hideous torture upon the animated tools of their enemies, may find hope in the conclusion of separate treaties by which the possibilities of conflict shall be eliminated from their mutual intercourse. In such treaties the great principle of the obligation to arbitrate should alone be contemplated. For that alone is the world ripe. That alone can the family of nations be called upon to guarantee. The state which refused to arbitrate, however it veiled its refusal, would put itself at once and hopelessly in the wrong. In the wrong, precisely as though, having agreed to arbitrate before a particular tribunal, it should decline to fulfil its promise, or should quibble about the terms of the award, or the conditions of reference. And it should be made clear in every treaty that Arbitration need not mean Litigation.



## CHAPTER II

### PENETRATION

THE clumsy and dangerous methods of litigation might indeed be tolerated, when the only questions in dispute between nations which could generally be referred to arbitration were those comparatively small matters which could be settled one way or the other by a cash payment of some thousands or tens of thousands of pounds. Such questions might be wrangled over in a sort of law-court without much harm to anybody. An occasional real or supposed injustice to a stray foreign merchant and a consequent litigation ending in the payment of damages were not very serious affairs. Nations did not come very much into contact. It was easy to be particularly careful at the points where they did. One was particular to behave properly to ambassadors and consuls. One was scrupulous about foreign vessels. One respected one's neighbour's landmarks, and one held civil language regarding his chief magistrate.

But now that the barriers of intercourse have been broken down—now that every state is flooded with the subjects of others—now that the demand is made with ever-increasing volume and insistence that the people of each state shall be permitted to enter and trade, and even to settle, in the territory of every other, and actually that they may do so as of absolute right—the situation has changed. No longer does a state, by committing itself to some particular form of arbitration, incur liabilities which may prove insignificant, and at the worst may prove expensive. It accepts a *régime* which at once

sets up an *imperium in imperio* and aims a vital blow at its sovereign authority and independence. The ship of state springs a leak, and may as well be beached at once in the safe and select company of those barnacled craft—county councils and parish vestries.

We have referred to the increasing persistence and boldness with which the claim is beginning to be made on behalf of strangers that they have an irrevocable right to settle in a country and to be treated, not only no worse, but a great deal better than its own subjects. They are to be treated, it seems, not only after the fashion of the nation which receives them, but after some average standard to which it is expected to conform. This is new doctrine. It is not often laid down in set terms. But it is none the less a working force. The result of it, were it to receive definite recognition, would be nothing less than to disestablish states as we know them. Whenever a community desired to live in a fashion which did not commend itself to its neighbours, it would be confronted by the necessity of leaving out of the scope of its activity this solid mass of undigested and indigestible foreigners. It cannot bring them into line with its own subjects : it cannot ask them to go. They remain, a privileged excrescence, a splinter in the body politic, a standing defiance to the law, a perpetual challenge to the native.

As has been said, it is new doctrine that any such position exists. Few jurists have examined with much care the position of the foreigner abroad. The question has two faces ; the right of the foreigner to settle, and his right to particular treatment if he does. And no work of authority since Puffendorf in terms admits the former. It is a matter which modern jurists do not treat, because there is no question about it. Any state has an absolute right to exclude foreigners if it chooses. And yet, when we turn from theory to practice, we are at least met by this consideration, that it is a right which it is exceedingly difficult to enforce. Nations condescend to all kinds of

sanitary, educational and racial tests, to avoid the imputation of excluding individuals of a particular country. A nation which should distinctly decline the admission of foreigners *in toto* would at any rate cut itself off from international intercourse, and would find itself in a highly uncomfortable state of reprisals with the rest of the world. Discrimination against a particular state, even as a matter of bargaining, would be deeply resented. The difficulty must then be faced, that we cannot dismiss the problem of how strangers are to be treated with the simple remark that it is not important how we decide the matter, since the strangers can always be excluded. Theoretically, they can. Practically, they cannot.

We are left, then, with the second problem. How are they to be treated? The question has been regarded as one of quite subordinate interest. If foreigners can be excluded altogether, then they must be thankful to be admitted on such terms as they can get. Now that they must in practice be received, and received in considerable numbers, there is no solution ready. To elaborate one is the most pressing problem of International Law. In the old days, long ago, the alien lived entirely on sufferance. Strangers who are in constant peril of receiving peremptory notice to quit, must inevitably comport themselves with a decent deference to the local power. And it will not do to complain if they are fleeced by duties, *droit d'aubaine*, and *gabelle*, or even if they are restricted to particular cities or particular quarters. Complaint may mean expulsion. Only in quite special cases of atrocious treatment did the alien's sovereign feel justified in urging a protest. His subject had put his head into the lion's mouth: he had only himself to thank if he got a rough lick from the royal tongue.

Apprentices, Dr. T. A. Walker tells us, might spend a happy holiday, in those spacious mediæval times, in the sacking of the well-stored steelyard of a foreign

merchant ; and nobody much cared. Gradually the position of the alien became securer.

We find Vattel, in 1744, asserting that, though he can<sup>1</sup> exclude foreigners, the territorial sovereign, if he admits them, " s'engage à les protéger comme ses propres sujets, à les faire jouir, autant qu'il dépend de lui, d'une entière sûreté." Vague as these expressions are, they show an immense advance on the old *régime*. They must not be pressed too far. They merely mean that the sovereign guarantees the general safety of his dominions. Foreigners are subjected to the law of the land ;<sup>2</sup> and the state, which can exclude them, can subject them to any restrictions it pleases,<sup>3</sup> provided these are publicly known. They may thus be placed in an inferior condition to natives : though it would be a cause of complaint to single out any nation for specially unfavourable treatment.

Vattel, in deference to the authority of Grotius, treats also of what he terms an " imperfect " duty (*i.e.* a duty so imperfect as to be useless). It was at once the strength and the weakness of Grotius to commingle in his discussion of legal topics purely ethical considerations. He brought an invaluable buttress to the support of propositions of law : but he was not infrequently led into passing off as law what were nothing but counsels of perfection. One of these counsels, erected into a duty, is the duty which he asserts exists, of allowing " harmless use " of one's own things. Most people would be surprised if they were told that their neighbours had a right to use their utensils and furniture while not actually in use by themselves. But the lengths to which Grotius was prepared to go in this direction can be gathered from *De jure Belli ac Pacis*, II. ii. 4, 5 ; in which no apprehensions of harm on the part of the territorial sovereign are suffered to excuse his opposition to the passage of a neutral army. Possibly the reason operative on Grotius' mind was the

<sup>1</sup> *Droit des Gens*, II. vii. § 94.

<sup>2</sup> *Ib.* §§ 102, 105.

<sup>3</sup> *Ib.* §§ 94, 100, 125.

theological necessity of justifying the narrative in Numbers cc. xx., xxi.: but he extends the duty to cases of permitting temporary residence,<sup>1</sup> permitting the transit of merchants,<sup>2</sup> permitting the erection of temporary structures by passengers,<sup>3</sup> and permitting immigration into unsettled territories.<sup>4</sup> His further remark that no tax which is not raised for the purpose of securing the safety of transit can be imposed on travellers, has been much misunderstood and echoes down the centuries as far as Heffter. "Nec capitatio, civibus imposita ad sustentanda reipublicæ onera, ab exteris *transeuntibus* exigí potest," says Grotius. "Les étrangers," says Heffter,<sup>5</sup> quite generally and quite wrongly, "ne sont pas soumis aux lois concernant les impôts personnelles." But the whole theory of the so-called "right of harmless use" was one of mere ethics, entirely divorced from practice. Grotius' scriptural and classical researches needed a corrective. By the simple process of saying that the territorial sovereign was the sole and sufficient judge of whether a particular use of his goods and territory was "harmless" or not,<sup>6</sup> such "rights" were relegated by the successors of Grotius to the category of "imperfect" (*i.e.* merely moral) rights, or counsels of perfection.

They went on talking about them, nevertheless, and attempting to specify cases in which the harmlessness of the act could not be disputed; and in one important particular, they continued (without altogether appreciating his meaning) to follow Grotius. If a nation does concede privileges of this kind to strangers, it must do so, they said, equally to all. Grotius himself seems not to have been contemplating these cases of "harmless use" when he enunciated the rule of equality. He was dealing with cases in which the use is not "harm-

<sup>1</sup> *De jure B. ac P.*, II. ii. 15, 1.

<sup>2</sup> *Ib.* § 14, 5.

<sup>3</sup> *Ib.* § 15, 2.

<sup>4</sup> *Ib.* § 16.

<sup>5</sup> *Droit international de l'Europe*, § 62.

<sup>6</sup> *Vattel*, *ut sup.* §§ 128, 130; cf. Wheaton, *Elements*, I. § 12.

less," and is enjoyed simply by permission : and here he limited the rule of equality to cases in which the privilege is the general rule : *i.e.* a special favour may be granted, whilst a special disfavour may not be imposed. But the distinction is not very tenable, and it is reduced *ad absurdum* in Vattel.

Vattel (apparently misinterpreting Grotius) puts the rule of equality on the artificial ground that by treating foreigners generally in a particular favourable way, the state shows that there is nothing intrinsically harmful to itself in the concession. Therefore it estops itself from alleging that the concession is anything but a "harmless use."<sup>1</sup> Therefore it is bound to grant it to others. Obviously the same reasoning would apply if the concession were made to five or six particular foreign nations. Vattel is forced to the lame reply, that to concede the liberty to particular nations does *not* show that it is "harmless." Grotius, however, does not seem to have rested the rule of equality on the supposed "duty" of the territorial state to permit "harmless" use. He is plainly considering only those acts which, even on his view, the state is free to allow or prohibit. And his distinction is between the exclusion from a general privilege and the concession of a particular favour.

We find de Martens, half a century later, laying down what may be taken as the established rule of strict law in modern Europe in such matters.<sup>2</sup>

"§ 88. Les frais qu'exige le gouvernement doivent être supportés par ceux qui profitent des avantages de son établissement. A défaut de domaines suffisants à cette fin, il faut avoir recours aux impôts. On peut lever des impôts, même sur des étrangers qui font un séjour

<sup>1</sup> The origin of the inclusion of these "imperfect" rights is to be found in some moral reflections of Grotius (*De j. B. ac P.*, II. ii. 11), based on the ethical discussions of antiquity.

<sup>2</sup> *Droit des Gens*, III. c. 3 § 88.

chez nous, en considérant (1) qu'ils jouissent de la protection de l'état; (2) qu'on peut imposer cette condition à leur admission. Ceci a lieu, à plus forte raison, à l'égard des étrangers qui s'établissent chez nous pour y gagner leur vie. Le droit des gens rigoureux ne défend pas même d'imposer plus fortement les étrangers que les citoyens."

The foreigner may therefore be taxed, and specially taxed.

Nor need he be subject to the same laws, and enjoy the same rights, as the native:—"Les lois civiles générales lui sont applicables, à l'égal du citoyen, en tant que les lois mêmes . . . ne font point d'exceptions, soit en sa faveur, soit à son désavantage."<sup>1</sup> And he can be excluded altogether—"s'il est inique de leur refuser le passage innocent, c'est à elle [l'état territorial] à juger si le passage qu'on demande est tel . . ."

The doctrine of "harmless use" is here reduced to an academic figment. It may be interesting to speculate on what might have been the consequences, if Grotius' scheme, in which it was a real and important institution, had been generally accepted. But that scheme never had the least chance of acceptance. Boiling with the ferment of a general dissolution of old ties and old ideas, the world was far from being in a state to receive elaborate new complexities of jurisdiction. Vassalage and empire had gone: suzerain and aulic court had sunk into meaningless titles: the feudal organization of a thousand years had been shattered, as rocks are shattered by the inevitable organic growth of living verdure. In that time of upheaval and dismayed unrest, there was one thing alone that the politician could cling to—the Sovereign Independence and Equality of states. Such an idea as that propounded by Grotius was essentially inconsistent with that cardinal conception. Its elaboration was a premature attempt to make states formally

<sup>1</sup> *Droit des Gens*, III. c. 3 § 85.

interdependent, when independence was the life-breath for which they were desperately gasping. It was "a pious imagination," in a truer sense than that in which Moray used the words of Knox's theoretic dreams. For the dreams of Knox may come true : and the dream of Grotius remains an imagination for ever.

In case of a denial of justice to a foreigner in the ordinary civil courts, de Martens (§ 100) concedes that his state may raise a diplomatic complaint, and enforce it in the last resort by reprisals (but, apparently, not by war). And he also says that injuries to a stranger must be criminally prosecuted just as though a native were the injured person.

Although, therefore, the views of Vattel and the doctrinaire school on the one hand, and those of de Martens and the positive school on the other, vary so widely in form, they really amount to much the same thing. The mode of expression of the former school is chosen so as to avoid formally representing the law as different from what pious aspirations would wish it to be. The latter is not concerned at the discrepancy, and leaves amelioration to conscious change in the future. Both are agreed that a nation must be master in its own house. It ought not to be a dog in the manger ; but, practically, it may if it likes. It can tax the foreigner as it pleases, if it is careful not to say that the money is solely intended for political aggrandisement. It need not distribute its favours equally, though it must not refuse them when to refuse would be an insult, as in the case of the people of one nation being singled out for the refusal of privileges freely enjoyed by the rest of the world.

Where the two schools appear to part company is on the question of the equality of stranger and native. De Martens says plainly that the laws need not be the same for both : Vattel is driven to say that the foreigner need not be admitted except under such restrictions as the



territorial state in its uncontrolled discretion thinks necessary. There is little difference in practice between the two propositions. Both agree that if strangers are admitted, they must be on an equality with natives, not in the sense of having equal rights, but in the sense of having them equally protected. Neither lays down in clear terms the limits, if any, beyond which the home state may not go in imposing restrictions. De Martens says that it must do its visitors justice. But he obviously does not mean "distributive" justice. The home state is not bound to make things pleasant for them. All that is meant is that such rights as it concedes must be fairly and adequately protected. The nominal grant of a right which the courts are too prejudiced or corrupt to enforce, is a mere trap for foreigners. But it is extremely invidious, in practice, to bring a charge of bias or corruption against the courts of a friendly power. And nations which are not troubled by such scruples of delicacy are only too apt to lay the misfortunes of their subjects to the account, not of a state's harsh laws, of which they cannot complain, but to that of its tribunal's misbehaviour, of which they can.

Apart from this correct, but delicate, requirement of honesty in the administration of the law, de Martens' views are reproduced by Klüber, who wrote a few years later : <sup>1</sup>

"Le droit de propriété de l'état étant indépendant de toute influence étrangère, il s'ensuit, que l'état peut exclure tout étranger de . . . l'usage de son territoire dans les cas de nécessité,<sup>2</sup> mais encore de tout autre usage qui pourrait en être fait, sans d'ailleurs lui nuire d'une manière quelconque, par exemple le passage ou séjour, le commerce, un établissement ou une acquisition ; il est libre de n'admettre

<sup>1</sup> *Droit des Gens Moderne de l'Europe* (1818), § 135.

<sup>2</sup> This right of using a neighbour's goods, if "necessary" for one's own support, was, like "harmless" use, conceded by Grotius, as "necessary" use.

ces sortes d'usage de son territoire que sous certaines conditions ou restrictions, par exemple de se légitimer, de payer certains impôts, de se soumettre durant le séjour dans le territoire aux lois du pays, notamment au droit d'aubaine,<sup>1</sup> d'y être traité en sujet temporaire, etc." And if the home state exercises its strict rights with leniency in practice, this creates no reason why it may not exert them less liberally if it thinks fit. The usage, indeed (he adds), is to exercise much leniency, especially in matters of commerce.

Klüber invokes the authority of Günther (II. pp. 230-234). Nations, says the latter, have no effective right available for their relief, on account of their mere situation, when they are cut off by the territory of another state (as happens in the case of upper riparian states). Nor have they any absolute right (except for self-preservation) to transit across its territories, or to interference with it in any way. But Möser, who wrote ten years before Günther, is the real fountain of the practical theory which thus appears in Günther, Klüber and de Martens. The conjecture may be hazarded that Möser, versed as he was in the law of the Germanic Empire, extended to the independent states outside its orbit the legal conceptions which prevailed within it. Nobody would believe that the Grand Duke of Saxe-Altenburg had any right to borrow the Bishop of Mayence's horses, for "innocent use," when His Eminence was away from home. No one would think that the Elector of Hanover had the right to march troops along the King of Prussia's highway, after the fashion of Joshua. No more, then, had any Czar of Muscovy or King of Portugal the right to do the like. From this date, the bold and elastic speculations of Grotius gave place, even in theory, to the quasi-municipal legalism of modern International Law. Grotius was before his time. The application of

<sup>1</sup> And therefore to laws which do *not* apply to the native, and which confiscate a deceased foreigner's property.

his theory postulated a society more advanced in ethics than that of either his or the present day. Hard necessity compelled the acceptance of a more rigid system. The one thing needful was to uphold the absolute sovereignty and independence of states. It was necessary to throw no question upon this keystone of the post-reformation system, by insisting on that interdependence of states which was involved in the idea of the right to "innocent use." "Innocent use," as a substantial right, had to disappear. Vattel emptied it of meaning, and his successors denied its validity and competence. Its ghost still haunts the discussion of territorial waters.

Throughout, then, we see the original principles persisting. With the single exception of the theoretical attack on it from the seventeenth to the eighteenth centuries—an attack which produced not the slightest effect on practice—it is regarded as within the absolute right of a sovereign to exclude foreigners at pleasure, and to subject them to any restrictions whatever when admitted. The real march of progress was in a different direction. It lay, not in securing an illusory equality for foreigners with subjects, but in realizing an elementary security for their freedom from gross ill-treatment. For a sovereign to entice foreigners into his dominions by a misleading promise of security was regarded as unlawful.<sup>1</sup> Gross cruelty to foreigners equally became a subject of complaint.

As early as 1579, to avoid international embroilments, the Netherlands provinces, at their union, mutually agreed—"de faire bon bref droict, et expédition de justice, aussi bien aux forains et étrangers, qu'à leur sujets et citoyens," providing that "si aucune d'entre elles y estoite défailante, les autres leur confédérées tiendront la main, par tous moyens raisonnables et conuenables, que cela soit faict, et que tout abus qui le pourroient empescher, ou retarder le cours de justice,

<sup>1</sup> Cf. Vattel, *ut sup.* § 94.

soient corrigez et reformez, selon droict, et suivant les privilèges et anciennes coustumes d'icelles." <sup>1</sup>

And by the Grand Design of Henry IV., each subject sovereign, it was proposed,—“exterminera à ses frais les voleurs et les bandits sur ses terres, et les pirates sur ses côtes, sous peine de dédommagement.” <sup>2</sup>

When the Hamburg senate gave up Napper Tandy to Great Britain, Napoleon laid an embargo on Hamburg ships, on the ground that the city had outraged a French citizen.<sup>3</sup> The state papers of the ensuing century are full of such reclamations against the ill-treatment of aliens. We may fairly discount the flamboyant quixotisms of what may be termed the *civis Romanus* period, in which the chivalry of England and of France appeared as the patrons of a Potentin Bonhomme and of a David Pacifico. The story of Pacifico's furniture, for which we imperilled the peace of Europe, is by this time sufficiently familiar in this country.<sup>4</sup> Less is known of that less reputable worthy, Potentin Bonhomme. His championship by the government of Louis Philippe was of a piece with that monarch's hectoring policy in Tahiti and elsewhere, which was pilloried by Landor in a well-known “Imaginary Conversation.” Convicted of a disreputable offence against public decency and Catholic sentiment—the details are recounted in Vol. XVIII. of the *British State Papers*—Bonhomme was sentenced in the regular course of justice to a degrading penalty, from the completion of which he was rescued by French cannon.

When we are inclined, in our insular modesty, to believe that we alone could produce an adept in *blague* like Palmerston, we may think of Count Molé and Louis Philippe and be comforted. Henry Temple was only a

<sup>1</sup> Dumont, *Traité*s, V. i. 326, Art. 17.

<sup>2</sup> See Evans-Darby, *International Tribunals*, p. 29.

<sup>3</sup> De Martens, *Causes Célèbres*, IV. 125.

<sup>4</sup> 40 *State Papers* 640; *ib.* 39.

second-hand imitator of their sublime impertinence. Such flagrant instances of indefensible interference with the course of justice in a foreign country, we dismiss as throwing nothing but darkness on the matter. The United States have frequently made warm representations against the imprisonment of American Fenians; and their government is said to have interested itself in the case of non-political prisoners—but in every instance without result. British subjects have been condemned as spies by Japan, as poachers by Germany, and as revolutionists by Russia; but (except in comic opera) no diplomatic ironclad has released the prisoners. Yet it is impossible to deny that some limit to the powers of the territorial sovereign exists. Where can it be placed?

Take as strongly contrasted instances three from the history of Austro-British diplomacy: the Harwood case of 1852, the Walker case of 1851, and the Cunningham case of 1853.

In the former,<sup>1</sup> the Vienna correspondent of the London *Morning Chronicle* was (in Dec. 1852) arrested, searched and detained for nineteen hours in prison: Vienna being then in a state of siege. The Austrian Minister declined to admit that this was in any way unjustifiable, although there was, in fact, no charge preferred against the correspondent. For the fact that he was not treated with due consideration in the matter of food and quarters, an apology was made and the police agent was reprimanded and sentenced to ten days' incarceration. Contrast with this the case of Captain Walker,<sup>2</sup> which happened at Florence in the previous year (Aug. 1851). He was imprisoned for twenty-one hours on a charge of proselytism which was then withdrawn. No apology whatever appears to have been made. The reason is clear. The only reason why an apology was tendered in the *Harwood* case was that the state's own regulations regarding the treatment of arrested persons had not

<sup>1</sup> 44 S.P. 236.

<sup>2</sup> *Ib.* 600.

been complied with. So in the *Cunninghame* case of 1853, the person accused of proselytism declared to the British agent<sup>1</sup> that "she should hardly fancy herself in prison" and "had not a word of complaint to utter," being treated "with all the attention and civility she could wish." The arrest was effected on 12 Sept. and the release on 11 Oct.

No apology was made, and so far the case was exactly like that of Walker, except that the proceedings were more prolonged and formal. But Lord Clarendon took occasion to lay down a principle which appears to go far beyond what was called for. Miss Cunningham, a transient visitor to Tuscany, had distributed evangelical tracts, and was alleged to have thereby rendered herself liable to at least five years' penal servitude. The trial was expected to take place in about three months, but at the expiration of the first month, Lord Clarendon<sup>2</sup> addressed a note to the British Chargé d'Affaires at Florence, observing that the government had hitherto trusted to the right feeling of the Grand Duke to perform "an act of justice and clemency" in releasing Miss Cunningham; but that if the application for her release were now to be refused, he was to inform the Minister for Foreign Affairs that a continuance of her imprisonment was not to be endured, and to insist upon her being permitted to leave the country. It was added that the friendly relations of the two countries depended upon compliance.

Unfortunately for science, the Grand Duke had, before the despatch of this message, seen fit to discontinue the prosecution. How Lord Clarendon's language is to be reconciled with his prior despatch of 26 Sept.,<sup>3</sup> in which he committed H.B.M. Government to the broad doctrine that "British subjects are bound not

<sup>1</sup> 44 S.P. 549, Fenton to Scarlett, 25 Sept. 1853.

<sup>2</sup> *Ib.* 559, Clarendon to Scarlett, 12 Oct. 1853; p. 563. Same to Same, 14 Oct.

<sup>3</sup> *Ib.* 541.

to disobey the laws of the country in which of their own free will they may choose to reside," it is not very easy to see. If they are bound to obey the law, they are bound to undergo its penal provisions. Some reliance was placed on the fact that Miss Cunninghame (who was thirty years old) was in partial ignorance of the Tuscan law,<sup>1</sup> which had recently been made more stringent; and we have already suggested that a law which is not well known and in constant operation cannot rightly be applied, if of great severity, against transient strangers.

Sig. Baldesseroni, the Tuscan Minister, in fact, applied formally to the British Chargé d'Affaires, that the latter should specially bring to the notice of British subjects the state of the Tuscan law on the subject—which delicate office Mr. Campbell Scarlett politely declined.<sup>2</sup> According to a letter addressed to Lord Clarendon by Mr. Stuart (a relative of Miss Cunninghame), "She was aware of the stringent nature of the law, but in common with most people, considered that no attempt could be made to enforce it. . . . The character of the law seemed monstrous, the punishment it awarded so disproportionate to the act against which it was aimed, and . . . so contrary to the tenor of the gospel and the spirit of the age, that she felt it never could be put into execution."<sup>3</sup>

And it is probably on these circumstances combined—the fact that the accused had only been spending the summer in Tuscany, and was on the point of embarking when the tracts were distributed, the recency of the law<sup>4</sup> imposing a minimum penalty of five years upon proselytizers, and the highly specialized character of the

<sup>1</sup> 44 S.P. 562, Scarlett to Baldesseroni, 5 Oct. 1853.

<sup>2</sup> *Ib.* 567, Baldesseroni to Scarlett, 10 Oct. 1853; 569, Scarlett to Clarendon, 22 Oct. 1853.

<sup>3</sup> *Ib.* 577, C. Esmé Stuart to Clarendon, 25 Oct. 1853.

<sup>4</sup> Promulgated 1 Sept. 1853; *loc. cit.* p. 581.

offence—that Lord Clarendon relied. It is conceived, however, that whilst they made the leniency of the Grand Duke commendable, they did not justify Great Britain in interfering with the course of justice in his dominions, unless we are prepared to admit a universal right of religious propaganda.

It is not without importance to note that opinion in Florence was much divided—"a very large portion of society, both Tuscan and English and natives of other countries, were not slow to declare her interference with Roman Catholics to be an act of unwarrantable presumption, and one deserving the penalty of a risk which she must have been well aware she was running,"—though it was unanimously considered that ten years' hard labour was a good deal too much for distributing tracts.<sup>1</sup>

As Phillimore (I. § 220) puts it: "It is a received maxim of International Law, that the government of a state may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it." There is nothing to prevent a nation from having *pericæci*.

What limits are to be laid down to this principle?

Modern writers carefully confine themselves to generalities. Calvo (*Droit international*, § 700) says that aliens must enjoy the protection of the law and custom of the land for their persons, property and family relations. This is to go only a little way: the very question may be, What is to be recognized in their peculiar case as their property or their family? How far is the state to be obliged to protect them in rights which it would not create? And the adoption of the national law as the standard of the protection which must be accorded to their persons is certainly mistaken. Aliens may be subjected to special legislation, throwing

<sup>1</sup> 44 S.P. 592, Scarlett to Clarendon, 1 Nov. 1853.



great personal inconvenience upon them, as the price of their residence. Phillimore (*International Law*, III. § 2), equally vaguely with Calvo, asserts that they have "a strict right to be secured from injury"—leaving it unexplained what injury is. (He adds that the violent, sudden and unnotified withdrawal of a right which foreigners have been accustomed to enjoy is an international offence.) Nor is he much more explicit, in stating that<sup>1</sup> "foreigners whom a state has once admitted unconditionally to its territories are entitled not only to freedom from injury, but to the execution of justice in respect to their transactions with the subjects of that state"; and that<sup>2</sup> "the state to which the foreigner belongs may interfere for his protection when he has received positive maltreatment, or when he has been denied ordinary justice, in the foreign country." What is "maltreatment"? Broken bones—or heavy tolls? What is meant by "ordinary" justice? Unbribed judges,—or commonly current law?

It will be seen that the position was, and is, as unsatisfactory as it well can be. So long as foreigners were few and their complaints obstructed by difficulties of communication, not much inconvenience appears to have been felt. But with the coming of the nineteenth century—with the great extension of trade and travel—with the universal post-box placed at every aggrieved individual's door—it became imperative to settle the matter. Since the jurists gave out no certain voice, nor, indeed, much articulate guidance at all, it was necessary to make things plain by treaty. And, since commerce was the grand factor in producing the movement of populations of which the stirrings were now perceptible, like the awakening from slumber of a giant, the needful provisions took the form of clauses in Commercial Treaties. This is not a history of Commercial Treaties. It is sufficient to observe the appearance in them of the provision

<sup>1</sup> *Loc. cit.*, II, § 2.

<sup>2</sup> *Ib.* § 3.

guaranteeing the safety of merchants, and to note its gradual development and extension.

Liberty to trade at all was one of the first things aimed at in such instruments. It involved, almost as of course, liberty to reside in, and to travel to a certain extent in, the foreign country whose rulers granted the concession. It involved, less necessarily, but still imperatively, the guarantee of a certain protection of person and goods. Unfortunately, states rested content with a vague assumption that some distinct right to personal security and undisturbed possession existed, apart from the laws of any particular country, and recognized all the world over. The error has been productive of a dangerous situation. It need not be denied that some such minimum right to property and security may exist *jure gentium*. The mistake was to assume that it was a definite and easily ascertainable right, instead of a misty outline. Some sort of abstraction from all known municipal laws—some sort of minimum essence of right—some greatest common measure of varying legislations—might conceivably be elaborated and held to provide a standard interpretation for such treaty provisions. But it never has been elaborated, and it is highly probable that it never will be. Yet the treaties presuppose that the abstract right of a human being to security and property is an ascertainable and definite thing. Naturally they do not lay down any such theoretic doctrine. They are business documents. But they involve its assumption. That is their initial weakness. A second serious defect is that in promising freedom of entrance, residence and travel, they either say too much or too little. In terms, their language might be supposed to confer an absolute liberty on foreigners to go where they liked, when they liked and as they liked. This would be an absurd construction. It is well understood that the foreigner has no right to force his way on to private property. Does the sovereign, then, promise to give him

the same liberty as the native ? The standard clause does not say so : and the native's liberty to trade and travel may be very restricted, or might be so restricted any day by domestic legislation. Such a precarious concession is not what the trader expects. Again, does the sovereign promise to abstain even from non-coercive measures, directed to depriving the legal freedom of the foreigner to reside or trade of all practical effect ? It may refrain from expelling or penalizing the foreigner ; but what if it exerts all the arts of official persuasion and influence, to persuade the people not to deal with him or to let him apartments and warehouses ? The question becomes acute when the necessities of life are in the hands of a public body. Has the government performed its duty when it refrains from actively preventing the foreign trader from residing in its territory ? Or must it coerce the public body into providing him with what it supplies to the native population ? And if a public body, why not private persons ? The franchise of a municipality, or of a province, is (or may be) as much its private affair as the property of an individual is his private affair. The Duke of Hamilton, say, can exclude foreigners from Arran. Might not the Bailies exclude them from Glasgow ? The gardens and the bakehouses of a city may be as much and as little under the dictation of the central government as the gardens and the ovens of a single citizen. Certainly in Anglican jurisprudence they are so. Legally, the central government may have the power to legislate for both. It is not a question of state rights. But morally, it is, or may be, as little the province of the central government to barter away the powers of municipalities, as to barter away the powers of individuals. It may do so ; but it is not expected to do so.

Suppose, then, that the local government, acting within its powers, sets itself to nullify the privileges granted by the central authority : just as a particular

person or association might, as every one admits, set himself or themselves to nullify them by declining to deal with a foreigner, or to let a house to a foreigner. Is the government to bow politely and say to the indignant pioneer of foreign enterprise:—"True, we promised that you might open a bank here: so you can! Only you cannot expect us to eject somebody else, in order to provide you with a building; nor to refrain from advising our subjects to deal with native firms; nor to withdraw the patent by which Messrs. X. have a monopoly of banking in our Eastern province; nor to revoke the charter by which the council of our Northern province has a faculty of regulating the banking business there—of which it has availed itself to decree your exclusion. Suppose a settlor has instructed his trustees only to bank with native firms—you could not argue that we should legislate so as to contradict his wishes. Why should we coerce the Northern province in the exercise of its equally undoubted privileges?

"Mr. V., the apothecary over the way, contracts that his ex-apprentice William may carry on business in the same town, in spite of his covenant not to do so. But Mr. V. never supposes that this debars him from doing all he can to prevent William from getting any custom. Why should we think differently?"

These questions may not be without an answer; but it is not upon the surface. That they are the very reverse of academic will be apparent when we come to look into the question of the Japonico-American treaty, and its operation in California.

An early instance of such treaties is the Swedo-Russian of 1617.<sup>1</sup> It provided in succinct terms for entire liberty of commerce, with establishments of merchants in certain towns, and due provision for payment of debts. But, apart from such occasional neighbourly concessions—

<sup>1</sup> Hauterive et Cussy, VIII. 466.

England and Castile had long traditions of commercial friendliness, and so no doubt had several Imperial states—it was not until nearly the middle of the seventeenth century that commercial treaties of the modern kind became frequent, under the impulse of the growing power of the commercial Dutch, and, ultimately, in response to the growing sense of statesmen that politics had become commercialized.

By the Dano-Spanish treaty of 1641, freedom of commerce (subject to Crown pre-emption) being granted, it was added that “les naturels des deux états, de même que ceux qui s’y trouvent naturalisés, jouiront réciproquement chez l’allié dans tous les actes, *quel qu’ait été l’usage contraire*, . . . de la considération positive des sujets de la couronne à laquelle ils appartiennent.”<sup>1</sup> Taxation was limited to that payable by the native. By Art. 18—“pour defendre solennellement en justice les sujets des deux états . . . on est convenue réciproquement d’admettre les consuls.” By Art. 24—“Sa M. danoise ayant prié S. M. Catholique de faire dépêcher et juger au plus tôt par les tribunaux, les causes ou les procès de ses sujets encore en instance,” that sovereign offered to expedite them: and for the future both parties agreed to press upon their judges the importance of despatch in commercial matters.

Practically this formula is a standard one to the present day. Another, and a wider, formula was however developed concurrently with it, and was at first adopted by close allies only.

In 1642<sup>2</sup> a treaty, signed by Britain with Portugal, granted, with the particularity appropriate to easements,

<sup>1</sup> Art. 3: Hauterive et Cussy, IV. 414.

<sup>2</sup> 29 Jan. (Lond.) Dumont, *Traité*s, VI. (1) 238 (French); Hertslet, *Treaties*, II. 1 (English from Latin). The versions vary somewhat, but the French version is intelligible throughout, which the English is not. It makes the parties contract to allow the import of merchandise “to buy or sell.”

reciprocal liberty of commerce—(Art. 2) “. . . (whether by sea, land, or fresh water) to go, enter and sail in and to the kingdom and dominions aforesaid, and the cities, towns, havens, shores, sea-roads and territories of the same : and with carriages, horses, burdens, ships, loaden or to be loaden, to bring in merchandises and cargoes there ; to buy or sell as much victuals as they will, and upon just prices to make provision of things necessary for their sustenance and voyages ; and to repair their shipping and carriages, whether their own or such as they have borrowed or hired ; and from thence also with the same freedom to depart, with their merchandises, goods and other things whatsoever (after payment only of the accustomed tolls and duties on the scale established by regulations of each locality), and return to their own country, or proceed anywhere else they please, whensoever they choose, without let or hindrance.”

Art. 3 provides that in respect of prices, and otherwise with regard to sales, the treaty power's subjects shall be as well treated as natives. This would be an extraordinary concession, and one impossible to carry out, were it not that it refers to a state of things when prices were normally regulated (or attempted to be regulated) by governmental action. It evidently means that the foreigner shall not be worse dealt with than the native *by the high contracting power* (i.e. the King).

Art. 4 provides against the British being burdened with higher customs or taxes than the Portuguese. Arts. 5 and 10 prevent their ships from being forced to load particular goods, or impressed for the Portuguese service. Art. 9 abolishes the *droit d'aubaine*.

Art. 13 deals with the Portuguese Colonial trade, which is maintained on the footing of the *status quo*, in cases where British subjects were accustomed to exercise it : subject to customs not exceeding those imposed on natives. The most favoured nation treatment is extended to the British in respect of religion and arrest.

In 1654,<sup>1</sup> a good many additions were introduced. The important saving (which no doubt was implied before) was made to Art. 2—"saving nevertheless all the laws and statutes of each place." Art. 3 was remodelled, and conferred liberty on the British to buy practically without governmental restrictions at all—*e.g.* from wholesale dealers; at a market price; in defiance of monopolies.<sup>2</sup> A new Art. 13 prohibited the arrest of British subjects, except criminals taken in *flagrante delicto*. It also conferred on them the right "to sue every man to justice, whatever be his protection or passport." By Art. 14 the King of Portugal undertook that the British should be molested by no *person*, court or tribunal for the use of English Bibles, etc., or the observance of their own religion in private houses and on board ship. If, therefore, a Portuguese had dismissed an English servant because he discovered him to be a Protestant, would a cause of complaint have arisen? We must almost certainly take it that only such molestation is meant as would have been illegal by the law of Portugal, if no question of religion had arisen.

By Art. 21, the British are exempt from performance of personal public duties and from the necessity to wear and furnish arms. By Art. 22, perhaps the most important addition of all was made—"Uti mercatores partis alterutrius prædictæ, eorumque institores, famuli, familiæ, negotiatores, aliique ministri, nautæ, naviumque magistri et classiarii, in ditionibus, territoriis et regionibus prædictæ reipublicæ et regis, necnon in eorum portubus et littoribus tuto ac liberè versari possint: populusque et subditi unius, in ullis alterius ditionibus ædes proprias in quibus habitent, habere et possidere, necnon repositoria in quibus bona, mercesque suas recondant, *quamdiu conduxerint*, absque ulla à quopiam molestiâ. Item gladiis se cingere, armaque secum portare tam offensiva

<sup>1</sup> 10 July. Dumont, *Traité*s, VI. (2) 82; Hertslet, *Treaties*, II. 8.

<sup>2</sup> See also Art. 10 as to sales to Portuguese.

quam defensiva, secundum morem et consuetudinem loci, quo se ipsos bonaque sua melius tutari possint."

We have italicized the two vital words which make it clear that Portugal and Britain guaranteed no right to houses apart from the consent of their respective subjects, owners of the same.

And so, in 1660,<sup>1</sup> the close Brito-Danish treaty—which incidentally engaged the two crowns to prevent traffic by their subjects in contraband—agreed (Art. 6): "Utriusque regis subditis liberum erit alterius regna, provincias, emporia, portas et flumina cum mercibus suis tam terrà quam mari adire, ibique versari et negotiari, dummodo consueta vectigalia solvant: salvà tamen utriusque regis superioritate jure in regnis [etc.] suis." By Arts. 7 and 8 certain ports were interdicted and the right of wreck (with a saving not very explicit)<sup>2</sup> abolished.

Then, what does not appear in the Brito-Portuguese treaty, the stipulation is made that:

"Si alterutrius regis subditi in alterius territorio lædantur, vel injurià sive detrimento<sup>3</sup> afficiantur, tum rex illius loci ubi injuria illata est, curabit, ut secundum jura et consuetas regionis leges promptè justitia administretur, iisque, qui delictum vel injuriam commiserint, debita pœna cum reparatione damnum passis faciendà infligatur."

Art. 10 abolishes reprisals:—"neque per repressalias, aut alios hujusmodi odiosos processus alter id luet in quo alter deliquit, nisi justitia denegabitur aut plus justo deferetur; in quo casu, regi illi, cujus subditus damnum et<sup>4</sup> injuriam passus est, licitum erit, juxta juris gentium leges et præscripta, omni modo procedere, donec facta fuerit læso reparatio."

<sup>1</sup> Dumont, *Traité*s, VI. (2) 346; Hertslet, *Treaties*, I. 179 (trans.).

<sup>2</sup> "*Salvo jure utriusque loci.*"

<sup>3</sup> *Sine injuria?*

<sup>4</sup> See last note.



These important provisions do not pretend to define what *injuria* is: obviously it may differ in different countries; whence come difficulties.

But by Art. 16 (neither is this in the Portuguese treaty), "*Utraque pars subditis ac populo alterius jus et æquum secundum uniuscujusque regionis leges ac statuta, celeriter et absque prolixio et non necessariis ambagibus ac impensis administrari faciet, in omnibus causis et litibus. . . .*"

By Art 13, most favoured nation rates of customs and immunities are conceded:

"Ita tamen, ut utriusque regis summa potestas in eorum respectivè regnis, ditionibus, dominiis atque portubus; vectigalia, et alia quævis pro re natà statuendi vel immutandi salva et illæsa maneat, modi memorata æqualitas ab utrâque parte prædicto modo strictè observetur." Both parties agree to suppress pirates<sup>1</sup> "*quantum fieri possit, et in suis fuerit viribus.*"

New clauses (17, 27), in the subsequent treaty of 1670 granted permission to merchants to reside and trade without restriction of time,<sup>2</sup> and to carry arms (provided they do not incur suspicions by doing so).

By the Spanish treaty with Britain of 1667<sup>3</sup> it was provided, perhaps for the first time, "*que les marchands des deux nations, et leurs facteurs, serviteurs et familles, commis, ou autres personnes par eux employés—comme aussi les maîtres de navires, pilotes et mariniers—pourront demeurer librement et seurement dans lesdits états, royaumes et territoires de l'un et l'autre desdits roys, comme aussi dans leurs ports et rivières; et que les peuples et sujets d'un roi pourront avoir, et en toute liberté et seurité jouir sur les terres et états de l'autre de leurs propres maisons pour y demeurer; de leurs magasins et celiers pour leurs denrées et marchandises*

<sup>1</sup> Art. 19.

<sup>2</sup> Hertslet, *loc. cit.* I. 186.

<sup>3</sup> Hertslet, *loc. cit.* II. 153; Dumont, *loc. cit.* VII. (1) 27.

qu'ils posséderont,<sup>1</sup> durant le tems qu'ils les auront pris, et qu'ils en devront jouir, et qu'ils en seront convenus, sans aucune empêchement." And by Art. 31 (also a novelty) :

" Les sujets et habitans desdits pays alliez, pourront se servir et employer tels advocats, procureurs, escrivains, agens et solliciteurs, qu'ils adviseront bon être dans toutes les terres et lieux de l'obéissance de l'autre, ce qui sera laissé à leur choix, et à quoi les juges ordinaires consentiront toutes fois et quantes qu'il sera besoin."

The Swedo-British treaty of 1654<sup>2</sup> is peculiar as not relating so entirely to trade as the Portuguese treaty of the same year. Liberty of entry is first secured, and then freedom of trade is appended.<sup>3</sup> Justice without long and needless delays is promised.<sup>4</sup> A right of passage is conceded to merchants.<sup>5</sup>

The treaties of the eighteenth century did not carry the matter much further. In the Dano-Sicilian treaty of 1748,<sup>6</sup> indeed, there now occurs a clause (27) providing that—" . . . la condition des étrangers et des sujets naturels, sera égale et pareille, tellement que dans toutes les occurrences, la justice leur sera administrée d'une manière prompte et impartiale ; *particulièrement* dans les douanes et bureaux *ils seront traités avec douceur et politesse . . .* ." As to whether this was due to previous experience of Baltic bluntness or of Southern arbitrariness, history is silent.

In the Austro-Spanish treaty of 1725,<sup>7</sup> by Art. 21 (exceptionally well drawn), " le roi catholique *permet aux sujets* de ses royaumes d'Andalousie, Murcie, Arragon, Valence et Catalogne, comme aussi dans les provinces de Biscaye et de Guipuscoa, d'y louer des maisons pour y

<sup>1</sup> Qu., where this comma ought to come : according to Hertslet, after " marchandises."

<sup>2</sup> Hertslet, *loc. cit.*, II. 310.

<sup>4</sup> Art. 8.

<sup>5</sup> Hauterive et Cussy, *Traité*s, IV. 406.

<sup>3</sup> Art. 2.

<sup>6</sup> Art. 10.

<sup>7</sup> *Ib.* 75.

demeurer, et des magasins propres à conserver leurs marchandises. . . ." By Art. 23, merchants were not to be bound to produce their accounts or to keep them in any particular language. This provision seems to have been found of great value, and is often repeated up to quite recent times.

A remarkable convention exists of the date 1700<sup>1</sup> by which the city of Santander agrees to give certain privileges to English merchants. It "concedes and grants, in so far as depends on its part, that they shall enjoy the same conveniences, emoluments and immunities which are enjoyed and possessed by the people, inhabitants and natives thereof, without any difference, tax or burden being imposed, or any other annual charge, in whatever may depend on its political government.

"Also it concedes and grants to those who are or may become Roman Catholics, and who, with their wives, household and family, have completed five years of residence therein, that they may have liberty to enjoy and obtain the honourable offices thereof, and a voice and active and passive vote, in conformity with the custom and charter of election which it possesses to enable it to distribute the said offices among its inhabitants."

And even in time of war (Art. 7): "This town, in so far as it can consistently with the faith and loyalty which it owes to its king and natural lord, will assist the said merchants and give them every facility and good treatment which may be in its power . . . protecting their effects and business in so far as it is possible and permitted. . . ."

Also (Art. 8), "It shall be conceded and allowed them to build private houses in the town, in conformity with the power which is accorded to it by the laws of these kingdoms; and the magistracy [etc.] will give and mark out lands and estates, whereon they may construct in their own fashion the dwellings and gardens which are

<sup>1</sup> Hertslet, *loc. cit.* V. 456.

necessary, and to which their power extends ; and it is moreover granted that they may purchase manufactories, and reside in them or in dwelling-houses, inns or hired houses, without their being obliged to live with the inhabitants, or to incur charges for lodging, guards or other things. . . .”

This convention is important for two reasons. (1) It indicates clearly that the purpose of the grant of liberty in ordinary treaties of commerce to have, or to build, houses, is not meant as a guarantee in any shape or form by the government that there will be houses and lands available. It is merely a promise to relax the anti-social system under which strangers were often regarded as a prey, and forced to live in the most expensive style. Just as, in modern days, a government will occasionally find means to ensure that travellers shall stay at hotels and spend money, in transit, so, in less enlightened times, it boldly deprived them of the power of living cheaply in their own hired houses, and forced them into lodgings with, perhaps, a hired guard to protect them. The liberty to build and buy houses means no more than this. It does not encroach on any municipal or provincial privilege. And (2) the convention reinforces to demonstration this last statement. The convention was thirty-three years subsequent to the Brito-Spanish treaty<sup>1</sup> of 1667. Yet the municipal powers remain unimpaired, just as the provincial powers of California remained unimpaired by the Japanese treaty with the United States. And it is not a unique misapprehension by the city magnates of their powers. Seville, Cadiz, Malaga and the ports of Andalusia had acted in a similar way.

By the time of the Austro-Russian treaty of 1783, the “most favoured nation” clause had become the leading stipulation. And the various specific provisions had been disentangled and clearly distinguished. By mutual declarations, these Powers granted toleration ;

<sup>1</sup> *Supra*, p. 48.

import, export and transport (at permitted ports) ; prompt judicial enforcement of *contracts* ; liberty to keep business books secret, and in any language ; and free exit (but no right of entry, except perhaps by implication). By Arts. 24 (Russian), 26 (Austrian), the powers agree that each other's subjects may, if established in their territory :  
 " . . . y bâtir, acheter, vendre et louer des maisons dans toutes les villes qui n'ont pas des droits de bourgeoisie et privilèges contraires à ces acquisitions. . . ."

This expressly provides for local rights : it is curious that the saving has not been imitated more frequently. The British treaty with Russia of 1734<sup>1</sup> gives the liberty to build, buy or let houses, and to sell or dispose of them ; which seems curious, considering the common-law disabilities of aliens ; and also exempts Russians in England from *quartiers*, or billeting (Art. 16). In 1766<sup>2</sup> the saving of local privileges was added, and this was confirmed in 1797.<sup>3</sup>

As a typical sample of the commercial treaty of the early nineteenth century with South American states and others which were willing to concede wide and specific privileges, may be cited that between Great Britain and Peru of 1837.<sup>4</sup> Art. 2 grants to the subjects and citizens of the two countries respectively—" liberty freely and securely to come with their ships and cargoes to all places, ports and rivers in the territories aforesaid<sup>5</sup> to which other foreigners are or may be permitted to come, to enter into the same, and to remain and reside in any part of the said territories respectively ; also to hire<sup>6</sup> and occupy houses and warehouses for the purpose of their commerce ; and generally, the merchants and

<sup>1</sup> Hauterive et Cussy, *loc. cit.* VII. 191.

<sup>2</sup> *Ib.* 205.

<sup>3</sup> *Ib.* 224. By mistake, England and Ireland are named in this treaty instead of Great Britain and Ireland, in this particular clause.

<sup>4</sup> Hertslet, *loc. cit.* V. 383.

<sup>5</sup> Including the British territories in *Europe*.

<sup>6</sup> *Sc.*—" if they can."

traders of each nation respectively shall enjoy the most complete protection and security for their commerce ; subject always to the laws and statutes of the two countries respectively." The coasting trade is excepted. By Art. 4, extra-European trade is conceded to Peru on the footing of the most favoured nation. By Art. 8, "all merchants, commanders of ships and others, the subjects of H.B.M., shall have full liberty in all the territories of the Peru-Bolivian Confederation, to manage their own [business] affairs themselves, or to commit them to the management of whomsoever they please as broker, factor, agent or interpreter ; nor shall they be obliged to employ any other persons for those purposes than those employed by Peru-Bolivians, nor to pay them any other salary or remuneration than such as is paid in like cases by Peru-Bolivian citizens : and absolute freedom shall be allowed in all cases to the buyer and seller, to bargain and fix the price of any goods, wares or merchandise, imported into, or exported from, the Peru-Bolivian Confederation, as they shall see good, observing the laws and established customs of the country."

Reciprocal privileges (set out in full in the Spanish version) are granted to Peru : and it is added—"The citizens and subjects of the contracting parties, in the territories of each other, shall receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in the said countries respectively, for the prosecution and defence of their just rights ; and they shall be at liberty to employ, in all causes, the advocates, attorneys or agents, of whatever description, whom they may think proper ; and they shall enjoy in this respect the same rights and privileges therein as native citizens."

Art. 9 adds that—"In whatever relates to the police of the ports, the lading and unlading of ships, the safety of merchandise, goods and effects, the succession to

personal estates<sup>1</sup> by will or otherwise, and the disposal of personal property<sup>2</sup> of every sort and denomination, by sale, donation, exchange or testament, or in any other manner whatsoever, as also the administration of justice, the subjects and citizens of the two contracting parties shall enjoy in their respective dominions and territories, THE SAME privileges, liberties and rights AS NATIVE SUBJECTS; and shall not be charged in any of these respects with any higher imports or duties than those which are paid, or may be paid, by the native subjects or citizens of the power in whose dominions or territories they may be resident; subject of course to the local laws and regulations of such dominions or territories."

By Art. 10, a general exemption from military service, from "forced loans or military exactions and requisitions," and from ordinary taxes in excess of natives is conceded. Liberty of conscience is secured by Art. 13.

It thus appears that the liberty of leasing and acquiring houses has been definitely attached to the liberty of trade and the express liberty of residence which now accompanies it. But the whole scope of the document is directed to traders and their rights. It is problematical whether, under its terms, foreigners could have insisted on setting up a manufactory.

It appears, however, that within the limits of Europe, treaties had for long a much narrower scope. The old treaties, *e.g.* those of Great Britain with Portugal, Spain and Denmark, were renewed: but fresh ones give as a rule no express rights of residence. They however secure, in some cases, "full and entire protection for persons and property," "free and easy access to the courts of justice in the prosecution and defence of their rights," equal liberty with natives to choose their own

<sup>1</sup> "*Propiedades personales*" in the Spanish. It may be doubted whether it is a term of art in Spanish law.

<sup>2</sup> "*Propiedad personal*."

legal representative and advisers, and freedom from extra taxation.<sup>1</sup> But in others, even as late as 1847, they carefully refrain from any but financial matters.<sup>2</sup>

By 1856, we find the treaty of Great Britain with Honduras securing the liberty to engage in manufactures and mining abroad,<sup>3</sup> and also complete liberty of residence. The Russo-British treaty of 1859<sup>4</sup> is remarkable as being couched on the same broad lines (though it did not embody the unusual provision as to manufactures and mines), granting to the subjects of either nation (conforming themselves to the territorial law)—“full liberty with their families to enter, travel or reside in<sup>5</sup> any part of the dominions and possessions of the other contracting party.” And this is now the usual formula.<sup>6</sup>

It was perhaps Switzerland—the country which is sometimes ironically said to “earn its living by taking in lodgers”—that brought this feature of residence, apart from trade, into prominence. In the Brito-Swiss treaty of 1855,<sup>7</sup> the first article, departing altogether from previous models, begins *in limine* :—

“The subjects of H.B.M. shall be admitted to reside in each of the Swiss cantons on the same conditions and on the same footing as citizens of the other Swiss cantons. In the same manner, Swiss citizens shall be admitted to reside in all the territories of the United Kingdom on the same conditions and on the same footing as British subjects. Consequently, the subjects and citizens of

<sup>1</sup> See, e.g., the Greco-British treaty of 1837, Hertslet, *loc. cit.* V. 288.

<sup>2</sup> See the treaty of Tuscany with Britain, *ib.* VIII. 921.

<sup>3</sup> Hertslet, *loc. cit.* X. 872.

<sup>4</sup> *Ib.* 1058.

<sup>5</sup> The syntax of this common form leaves something to be desired.

<sup>6</sup> Since the treaty gives the right to acquire and dispose of all kinds of property, but no right to engage in manufacturing or mining, what is to happen if a foreigner buys or succeeds to a manufactory in the other country? Can he work it?—or must he lease it?

<sup>7</sup> Hertslet, *loc. cit.* X. 594.



either of the two contracting parties shall, provided they conform to the laws of the country, be at liberty, with their families, to enter, establish themselves, reside, and remain in any part of the territories of the other. They may hire and occupy houses for the purposes of *residence* and commerce, and may exercise (conformably to the law of the country) any profession or business."

Apparently the Aliens Act, giving a power of expulsion from the United Kingdom, cannot apply to Swiss, since it would be in contravention of the treaty. Art. 2 provides for expulsions, but apparently not such as are directed against aliens as such. The Russo-British treaty of 1859, though it did not put residence in the forefront, yet liberally admitted it, even as between two powerful nations negotiating "at arms-length," and initiated a new era.

Yet practice was by no means uniform. The treaty between Belgium and Britain of 1862<sup>1</sup> grants a mere liberty of commerce and equality of treatment in matters of commerce and navigation: but the Italian treaty of 1863 is framed on the same lines as the Russian,<sup>2</sup> and so is the Colombian of 1867.<sup>3</sup> The Prussian treaties of 1865 grant a mere exemption from extra taxes of persons who are in fact resident,<sup>4</sup> and secure that British ships and their cargoes shall be treated in Prussia as national. But in general, the new form is established as the standard.

The Netherlands-Austrian treaty of 1856<sup>5</sup> resembles the Belgian one above cited. The contemporary Austrian treaty with Belgium is distinctly more specific in its concessions,<sup>6</sup> and the Austrian treaty with Brazil of 1827 is as full and particular as the British ones with South American powers.<sup>7</sup>

<sup>1</sup> Hertslet, *loc. cit.* XI. 66.

<sup>2</sup> *Ib.* XI. 1112, 1115.

<sup>3</sup> *Ib.* XII. 365.

<sup>4</sup> *Ib.* XII. 762, 764.

<sup>5</sup> Neuman, *Traité Conclues par l'Autriche*, VI. 255.

<sup>6</sup> *Ib.* VI. 174.

<sup>7</sup> *Ib.* IV. 121; Martens, *Recueil*, VII. 225.

For an instance of a quite modern treaty conceding no general liberty of residence, one may refer to the British treaty with Paraguay of 1884.<sup>1</sup> Equality of duties, and treatment of foreign ships and cargoes as national is admitted, and foreigners who in fact reside are permitted "to exercise all rights, and therefore to acquire, hold and dispose of all kinds of property, whether movable or immovable." They must have free <sup>a</sup> access to the courts, and freedom from military service. And, while resident in the foreign territory, they are to have equal protection with citizens in respect of their houses, persons and property—a sufficiently pleonastic declaration. See also the Serbo-British treaty of 1880,<sup>2</sup> and compare the Uruguay treaty of 1884,<sup>3</sup> which concedes only that—"the subjects or citizens of each of the contracting parties shall be permitted to reside temporarily or permanently in the dominions or possessions of the other; and to occupy and hire houses and warehouses *for purposes of commerce, . . .*" (Art. 4).

Of the wider type of treaty are the treaties which in 1894 Japan negotiated with various countries, including the United States. The contracting parties agreed that :—

"The citizens or subjects of each of the high contracting parties shall have full liberty to enter, travel or reside, in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property. They shall have free access to the courts of justice in pursuit and defence of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their interests before such courts; and in all other matters connected with the administration of justice they shall enjoy all interests and privileges enjoyed by native citizens and subjects.

<sup>1</sup> Hertslet, *loc. cit.* XVII. 851.

<sup>2</sup> Not "*easy*."

<sup>3</sup> Hertslet, *loc. cit.* XV. 342.

<sup>4</sup> *Ib.* XVII. 1086,

"In whatever relates to rights of residence and travel, to the possession of goods and effects of any kind, to the succession to personal estate by will or otherwise, and the disposal of property of any sort and in any manner whatever which they may lawfully acquire, the citizens and subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties and rights [as], and shall be subject to no higher imposts or charges in these respects than native citizens and subjects, or citizens and subjects of the most favoured nation.

"The citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of commerce, and subject to the laws, ordinances and regulations, shall enjoy the right of private or public exercise of their worship, and also the right of burying their respective countrymen according to their religious customs in such suitable and convenient places as may be established and maintained for that purpose.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects or citizens of the most favoured nation. The citizens or subjects of either of the contracting powers residing in the territories of the other shall be exempted from all compulsory military service whatsoever, whether in the army, navy, national guard or militia; from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions."

Art. 2. "The stipulations contained in the preceding article do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of labourers, police and public security, which are in force or which may hereafter be enacted in either of the two countries."<sup>1</sup>

This probably represents the high-water mark, for the present, of treaties of this kind. In the present temper of nations, the unrestricted rights conceded by such an

<sup>1</sup> 86 S.P. 40, 524,; Hertslet, *loc. cit.* XIX. 691.

engagement are too wide. The rights conceded by the first paragraph as above set out are so complete, that it is difficult at first to imagine what more could be desired. The second paragraph, nevertheless, goes on to concede equal treatment in "all that relates to rights of residence and travel." These words are exceedingly vague, and they have already occasioned at least two sharp conflicts.

The first of these was in 1900.<sup>1</sup> Quarantine was imposed by local regulations in various places (particularly in Colorado) upon Chinese and Japanese. This was represented as a hygienic measure necessitated by their supposed susceptibility (along with Asiatics generally) to plague: but it could not be denied that discrimination had been exercised.

"The Imperial Government," observes Mr. Nabeshima,<sup>2</sup> "has no intention of demanding any privilege for Japanese subjects which will endanger the safety of the citizens of Colorado, and asks for them no other or more favourable treatment than is accorded to citizens of the United States and to aliens generally. But the Imperial Government will unquestionably consider that through the action taken by the Colorado Board of Health a right guaranteed to Japanese subjects has been rendered temporarily inoperative for unsatisfactory reasons and upon insufficient authority." Mr. Hay<sup>3</sup> referred the Japanese to the Federal courts, which were bound to take cognizance of treaty rights.

But no such reference was possible in the other case; that of the Californian schools. For, there, it was a question of what the treaty meant—of how far it meant to deprive localities of their quasi-private rights, in favour of Japanese. California had established state schools. Could it fairly be said that the treaty gave all Japanese a right to use them? It might as reasonably

<sup>1</sup> *For. Relations U.S.* (1900), 737 *et seq.*; (1901), 375 *et seq.*; 103 *Fed. Rep.* 1.

<sup>2</sup> *For. Relations U.S.* (1900), 755.

<sup>3</sup> *Ib.* (1901), 378.

be said that it gave Japanese a right to be present at every private person's dinner-parties. It was in no sense a right "relating to rights of residence or travel." Unless we distort those words so as to include every possible benefit which a resident or a traveller may enjoy, they must clearly be restricted to the rights which are directly involved in travel or residence.

Otherwise there is no point at all in their employment. The central government, in guaranteeing free access and travel, cannot possibly be supposed to grant free access to, and travel over, private persons' land. It may be conceded that it guarantees access and travelling rights over the public ways of its subordinate provinces. But it may be seriously doubted whether it confers any right of access, for instance, to a public park maintained by a subordinate state or a municipality. There is no guarantee in the treaty that subjects shall not discriminate, and in the nature of things there could not be. Equally, there is no guarantee that public corporations shall not discriminate, nor that subordinate states shall not do so. So far as the treaty secures free passage, it binds the United States to secure it in all the several states. It likewise binds the United States to secure that no restraint is put on that privilege by the imposition of galling injuries inflicted directly or indirectly by way of discrimination by those local authorities which have the coercive powers of legislation. But it cannot possibly bind them to see that all the privileges conferred by localities and private persons are conferred on principles of strict equality. It may be said that an exclusion from privileges is of itself a positive injury when the excluded person pays taxes. But it is not in reality so. *De minimis non curat lex*. "Free travel and residence" means travel and residence subject to no annoyance of a substantial and prohibitive nature. The refusal of society to receive one on equal terms—the refusal of a town to admit one to a park or to tramcars—are not interferences with the freedom of

residence. Neither is a speculative and hypothetical difference in the net benefit derived from one's gross taxes.

The treaty, certainly, goes somewhat further than this. It concedes, not only that the right of residence and travel is to be "free," but that it is to be "equal." The object of this is to cut down the discriminating power of public authorities; but not to abolish it. For the equality is only to be "relating to rights of residence or travel." The subordinate authority, it has been seen, must not, since it has penal and taxing powers, exercise them at all oppressively on the commorant. His residence is to be "free." In addition, it is to be "equal." The mere right of residence itself is not to be clogged by discriminative restrictions. But freedom *of* residence is not equivalent to freedom *in* residence. The right to reside must with absolute equality be maintained for such foreigners as it is for natives. But the rights which are not necessary for safe residence need not be conceded to him. The right to use institutions which the state, or the city, or a private individual, in its wisdom sets up, is naturally not a right necessary for the due exercise of the right of residence.

In point of fact, this awkward phraseology of the treaty arises—as so many difficulties do arise—from ill-considered drafting. In old treaties, the concession of liberty of commerce was first made, and then naturally followed the concession of equal rights in its exercise. So far as a matter like commerce was concerned, this was a clause susceptible of not very much ambiguity. But when diplomatists come to add "residence," the divergence between the grant of liberty to reside and the ancillary grant of equality of treatment "in all matters relating to residence" becomes serious. The negotiators clearly followed the line of least resistance: which is an easy course at the moment, but not always a remunerative one in the end. They put in the word "reside" in the

first clause without reflecting what an immense superstructure could be raised upon the correlative "residence," in the second. If history is to be any guide, the words "relating to residence" must have quite a restricted meaning.

The joint operation of the treaty provisions of the wider type and of the uncertainty which prevails apart from their operation, is to afford room for what is known as "pacific penetration." The term has gained currency during the last ten or fifteen years, in proportion as aggressive nations have grown bolder in insisting on pushing to literal extremes the wide statements of treaties and jurists. The right to reside and to trade being conceded, the pushful modern government insists on the fullest protection for its subjects, even when their ways are obnoxious to the population on whom they obtrude their delicate attentions; and it would inevitably consider itself mortally offended if their enterprise were to be in any way officially counteracted. The foreigners are held entitled to enter the country, and to expect a high standard of treatment there. This is, as we said, nothing less than to set up an *imperium in imperio*. The only considerable bulwark of a formal kind against such intrusion is the established liberty of imposing protective tariffs; and it is very far from adequate. Far more important and valuable is the less formally noticed power of minimizing the effect of the foreigner's right by putting pressure on the native; if not directly, at any rate in all those indirect ways which a government has at its disposal. A government which had conceded freedom of residence could hardly penalize its subjects criminally for letting houses to foreigners. That would be inconsistent with its grant. But short of that it might do a great deal in the way of anti-foreign propaganda. It might even openly declare that no government work would be given to persons dealing with foreigners. That would not be in derogation of its grant—which is to make

trade legal, not to facilitate it. The foreign state affected might be offended ; but it would have no serious ground of complaint.

But by far the greatest bulwark against the march of the pacific penetrator is a sound national sentiment.

In a country like Great Britain, which the Imperialist and the Little Englander unite in pronouncing free from a sound national sentiment, it may not be easy to realize the force of this. It is obvious that few English people would prefer to buy English velvet at threepence per yard dearer than they could get it from Crefeld,—or, in the rare cases where it is otherwise, would take the trouble to assure themselves of the English origin of their purchases. It is the fundamental fallacy of Protection that it attempts to protect a people who *ex hypothesi* have not the mutual sympathy to protect themselves ; *i.e.*, who are not worth protecting. But, even if we are driven to admit—and the writer by no means admits—that there is no national solidarity in the British Isles, we can easily find examples in Japan and Paraguay, in Venezuela, Morocco and Hungary ; or in any country where ideas have not been subordinated to cash values.

The notion which is at the root of “ pacific penetration ” is that the benefits which were formerly obtained by the rough method of conquest can now be had by securing trade advantages. Economic pressure (to use the cant phrase) can in virtue of these concessions—formally or practically exclusive—be placed upon the native population to yield up their possessions to the peaceful conqueror with the black bag. Metaphors are dangerous things : particularly in the mouths of men of science who are not accustomed to literary ornaments. And in this especial branch of political science, metaphor is responsible for a good deal of false reasoning. The scientific man is accustomed to ascribe similar effects to similar causes. He sees commercial activity producing in many cases the results of armed conquest. He is led to equate



the two, and to coin the misleading expressions, "economic war," "pacific conquest," "pacific penetration."

In point of fact, commercial activity, unlike war, depends entirely for its success on the weakness of all national spirit in the country "penetrated." It depends absolutely on the willingness of the people to sacrifice neighbourly feeling to cheapness and convenience. A nation with a high national spirit may be overcome in war. France sustained losses in 1870; Greece in 1892; Russia in 1856; Germany in 1804; Norway in 1814. But commercial exploitation depends solely on the selfishness and cupidity of the masses and the supineness of their leaders. War is a function of moral and material variables: commercial penetration is a function of moral variables alone. It is entirely within the power of the masses to sell their souls for the foreigner's attractive goods, or not. In war, a nation may be overpowered by brute force. In commerce, the weakest nation may defend itself by its own *morale*. "Pacific penetration" as a means of subjection is only possible when a society in decay has to be dealt with. Otherwise national sentiment will support the native.

A Mormon or Salvationist state might concede freedom of trade by treaty to its neighbours. They would do next to no business: simply because the sentiment of the population would prefer exclusive dealing. Freedom to trade in wine would be worthless among the Wahabees: freedom to trade in slaves, among the English. These are hypothetical cases. Solid fact supplies us with a more cogent illustration in the Chinese boycott of United States goods; in the course of which, the keenest commercial community of the world nullified by its perfectly voluntary action the value of the treaty rights granted by its government. You can promise foreigners to allow them to sell; but you cannot well promise to make your subjects buy. A similar phenomenon is witnessed in the Svadeshi movement in India. Svadeshist

Indians spontaneously decline to buy foreign goods, and to that extent the freedom of trade conceded by the Indian Government is useless to foreign traders.

It would be a great mistake to confuse Svadeshism with Protection. It is not of the essence of Free Trade that the consumer shall always buy his goods in the cheapest market. Its essence is that he shall buy his goods in his own chosen market. If he chooses to pay for the privilege of keeping his neighbour's (or his foreign friend's) established business together, against novel competitors, he may be doing a wise as well as a friendly thing. Free Trade leaves him free to do it, and to exercise his judgment in the matter. Protection deprives him of initiative and discrimination. It lumps all foreigners together as *capita lupina*. It compels him to buy in the dearest market. Svadeshism differs from that *toto calo*. It is the free use of free-trade powers in a particular way, which is thought to conduce to the national welfare, and which may or may not do so in reality. So far as the Svadeshist enforces his boycott by assault and battery, so far, and so far only, is his system Protective.

The Irish "Sinn Fein" movement is essentially founded on the same lines:—the organization of a peaceable, overwhelming solidarity, exercised in the sphere which must always be left to individual scope, and rendering the action of political or military force relatively negligible. And in all probability the feminist movement for placing the two halves of civilized humanity in a relation more nearly commensurate with their common-sense equality will, as Aristophanes long ago suggested, find its best success in a "sinn fein" attitude.

It is indeed difficult to understand the objections brought against the Svadeshic principle of the boycott. That persons who strongly disapprove of the character and acts of another should band themselves to have no intercourse with him, and to unite others with them in that course, seems the most natural thing in the world ;

and, moreover, to have good Biblical encouragement. The Primrose Leaguer who withdraws the Castle custom from the local grocer employs the principle of exclusive dealing as justifiably as Murtagh Murphy in the bogs of Connaught. Kissing goes by favour. The true objection to measures of boycott is that they are generally enforced on unwilling parties by violence and threats of violence. We have long heard of "the boycotting whose sanction is murder." But it is strange that this accident should so far blind statesmen that they should wish to eradicate the combination itself—which, in the nature of things, they can never do by forcible means.

The Chinese boycott of United States goods as a retaliation for the ill-treatment of Chinese in California was perhaps the first national boycott on an extensive scale. China, from the efficient way in which she is provided with energetic secret societies, was peculiarly well fitted to be the pioneer in this direction. Last July, Chinese employed the same weapon to demonstrate their disapproval of the Japanese action in demanding the surrender of one of their vessels which had been seized on the high seas by China on suspicion of smuggling arms. "Since May," says a writer, "the boycott has been obligatory in Manchuria. Everything Japanese has disappeared from commercial circulation. . . . A month has made such a difference to them that many are selling out at a great loss. Only Europeans are buying their goods. Chinese will not."

The example was followed with extreme success by Turks during the recent crisis. Austria having repudiated the phantasmal Turkish reversion in Bosnia and Herzegovina, an elaborate system was set on foot for the cessation of facilities for unloading the Austrian steamers, for the stoppage of business orders to Austrian establishments, and for the discontinuance of sales and purchases of Austrian-made goods. The last endeavour was, of course, merely ancillary to the second. There

could be no benefit to Turkey, or injury to Austria, in Turks selling Austrian-made fezzes to Turks, any more than in Turks wearing them. It did not harm the English bankers when the Irishmen burnt their notes! The measure was nevertheless necessary, as a check against importation. It would have been impossible to say for how long a shopkeeper had had the goods in stock.

By 13 Oct. 1908, meetings had been held and boycotting resolutions passed, as far away as Beyrût, and it was thus early rumoured that lightermen and stevedores would even refuse to discharge Austrian steamers.<sup>1</sup>

The boycott attained at once a full measure of perfection. Whether or not set on foot by the mysterious organization our ignorance of which we conceal by speaking of the "Young Turks," it was in full force like a stack-fire on the instant. It was not unattended by violence, but the intimidation which accompanied it was for the most part of a perfectly legitimate kind,—the threat that in case of non-compliance, the trader would be denounced as a traitor to the hopes of his countrymen, and speedily ruined. If a shopkeeper is to have liberty to stock what goods he pleases, his customers must equally have liberty to deal with whom they choose, and to persuade their acquaintances to deal with those tradesmen whom they honour with their preference. "Can the cook," asked Lord Herschell, "be doing wrong when he tells his employer that he will not stay in his place unless the butler goes?" So long as the pressure is peaceful, then, however overwhelming it may be, it is tyrannous and in the end impossible, to penalize or prevent it. "'Dour folk' have their rights," says Lord Justice Fitzgibbon,<sup>2</sup> "and in unduly limiting the exercise of those rights, people who think themselves tolerant may well say—'*Legem nosmet in ipsos sancimus iniquam.*'" . . . Human law cannot secure religious liberty unless

<sup>1</sup> Reuter.

<sup>2</sup> *Sweeney v. Coote*, 1906, I.R., I. 105, 107.

it admits liberty to be intolerant also." People's likes and dislikes may be very absurd—but legislation cannot alter them. According to Reuter, where persuasion and the assurance that the Ottoman courts would support them in breaking their commercial contracts with Austrians failed to satisfy merchants that they would be safe in adopting such a course, the organizers—"give the recalcitrant or hesitating merchant ten days to act in accordance with their request, failing which they threaten to denounce them in the Turkish papers, as traitors and enemies to the nation, and to do all in their power to ruin them otherwise. The effect of this," Reuter adds, "under existing conditions, is usually conclusive" (Nov. 12).

This is a very different thing from the boycotting "whose sanction is murder." Killing is unlawful: the loss of custom is a common trade risk.

But violence, the fatal concomitant of the boycott, was not unknown. At Jaffa<sup>1</sup> one authority states that a mob threw goods into the sea which had been landed from two Austrian vessels. The goods proved to be German property, and it is said that the local governor was removed, in deference to a German remonstrance. At Constantinople, in the first day or two of December, some Greeks who had landed from an Austrian steamer were reported by the *Daily Telegraph* to have been "ill-treated" and forced to swear fidelity to the boycott: whilst a few days later the luggage of passengers landing from the Austrian steamer was said to have been sunk.<sup>2</sup>

At Krivolak near Salonica a Turk's stock of Austrian sugar was destroyed by a mob. At Trebizond a consignment of cork was burnt. At Adrianople the discharge of an Austrian steamer was forcibly prevented, and at Smyrna Austrian fezzes were torn off the heads of passengers in the streets.<sup>3</sup>

<sup>1</sup> *Berlin Lokalanzeiger*, 21 Nov. 1908.

<sup>2</sup> *Westminster Gazette*, 9 Dec.

<sup>3</sup> Reuter, 13 Dec.

The lightermen and porters at the Bosphorus—mindful, perhaps, of old scores—entered into the situation *con amore*; and (according to the London *Telegraph*) organized a meeting at which they swore to make the boycott more rigorous. On the 28th Nov. the Austrian Ambassador treated the situation as simply intolerable, and is reported to have said that many of the porters were intimidated.<sup>1</sup> But the Porte replied that the government had nothing to do with the situation, beyond preserving order; and that it was incapable of forcing its humble subjects to work otherwise than when and where they pleased. The friendly offices of other powers were said<sup>2</sup> to have been invoked; and it was reported that France, at any rate, had responded<sup>3</sup> that the best means of bringing the boycott to an end would be for Austria to adopt a conciliatory policy towards Turkey. Foreign powers were of course affected by the proceedings of the Boycott Committee—for the Austrian steamers brought foreign cargo. Rice from Rangoon, transhipped at Trieste, was for example left to moulder in the ship's hold.<sup>4</sup> On 9 Dec. popular sentiment was so strongly in favour of a continuance of the boycott that it was doubtful whether the Government, *or even the Boycott Committee*, could stop it. Austria was indeed rumoured to have opened direct negotiations with the Committee.<sup>5</sup>

By 25 Jan. the political situation had improved, owing to the acceptance in principle by Turkey of the Austrian protocol of compensation. But the Committee were taking no risks: the boycott continued unabated;<sup>6</sup> though it was rumoured early in February that the Grand Vizier had informed the Austrian Ambassador that steamers from Trieste might resume trade.<sup>7</sup> It was

<sup>1</sup> Reuter, 29 Nov.

<sup>2</sup> *Ib.* 26 Nov.

<sup>3</sup> *Paris Temps*, 28 Nov.

<sup>4</sup> *London Daily Telegraph*, 3 Dec.

<sup>5</sup> *Westminster Gazette*, 9 Dec.

<sup>6</sup> Reuter.

<sup>7</sup> Reuter, 1 and 2 Feb. 1909.

estimated that before the end of the boycott, the Committee had been joined by 5,200 firms in the Ottoman dominions. By 8 Feb. it had not been removed: and naturally the tradesmen who had stocked expensive French and Russian goods were anxious to clear them at a remunerative price.<sup>1</sup> On the 10th it was announced that the Turkish Cabinet was on the point of issuing a notice "urging the necessity of a cessation of the boycott."<sup>2</sup> But it was not until the 24th (when the protocol was signed) that it was intimated that the Committee had informed the porters that the boycott ought to cease.<sup>3</sup>

The writer could not have desired a better illustration of the argument of this chapter than these events which have now transpired in Turkey. No one can doubt for a moment that the losses to Austria (estimated, comparatively early in the proceedings, at millions) were a potent lever in bringing about a termination of the dispute satisfactory to Turkey. But it is as an answer to pacific penetration that the boycott is so peculiarly suitable. For it is the people who must make the boycott a success, and it is precisely the people who resent foreign intrusion.

The simple refusal of the mass of the people to have anything to do with the privileged foreigner is an omnipotent weapon in "economic" war. Organized or spontaneous boycotting is an absolute answer to "pacific penetration." Indeed, a good deal less than boycotting will suffice. For boycotting means that its object will be treated as a "moral pariah." A state of things far short of this is all that is needed to prevent "penetration." It is quite sufficient for the trader to see that there is no chance of getting trade, though he may get champagne suppers and pleasant looks instead of curses and warm lead.

<sup>1</sup> *Daily Telegraph*, 9 Feb. 1909.

<sup>2</sup> Reuter.

<sup>3</sup> *London Times*, 27 Feb.

"Pacific penetration" is not formidable except to the fatalist. The smallest portion of matter is as impenetrable as the largest. It is only when the people of a country are without cohesion and without sense, that they can be subjugated by pacific means. "Penetration" has nothing in common with conquest but certain of its consequences.

A very similar (if not precisely the same) confusion attends a great deal of modern political speculation. Competition is spoken of as "war"; and we hear of the war of classes, of economic war and of its direful outcome, economic slavery. It seems to be on the way to be accepted as an axiom, that wage-earners are "wage-slaves." Exactly the same quasi-reasoning as crops up in the case of "pacific" penetration is alleged in support of the term. A slave is found to be obliged to work. A workman is found to be obliged to work. Therefore the causes of their compulsion are carelessly equated, and the workman—to his own disgust if he hears of it—is styled a slave. It would be just as reasonable to call a genuine Dahomey slave a paid workman.

One is familiar enough with the usage by which we playfully call ourselves "the slaves of circumstances," "the slaves of Mammon," or "the slaves of drink." Carlyle's apostrophe to the very subject of our present digression, the British workman, adopts this lively trope. "No man orders thee to come and go; but this absurd pot of heavy-wet can and does. And thou pratest of thy 'freedom.' Thou entire blockhead!" It is a playful trope, and we know it. But it is a melancholy spectacle when a nation takes its tropes seriously. External freedom is indeed nothing, in comparison with an enfranchised soul. That does not say that all kinds of external control are to be jumbled together and stigmatized as "slavery."

The slave has no choice between obedience to any



outrageous order of his master, and instant vile degradation. The working man can, at the worst, starve. He has the full control of his times of leisure. He can choose his trade. He can, and often does, leave his employer and better himself. What slave can? Sometimes he cannot throw up his work with the security of getting other employment. He is none the more a slave for that, than the manager drawing £1,500 a year is a slave because he cannot afford to quarrel with his job. Either could make a bare living if he cut himself adrift from luxury in the one case and rough comfort in the other. And both are free men because they have the liberty to do so. "What is the liberty of starvation worth?" moans the sentimentalist. Everything. It enables a person to put honour before bread and cheese. In these times of religious and public peace, one is apt to forget that life and rough comfort may sometimes have to be voluntarily sacrificed. The working man and the peer are free, because neither can be prevented from going out into the wilderness, or be subjected to capricious dishonour while he remains at his post.

Mr. Maddison, M.P., has in unfortunately fugitive letters to the press, very well brought out the essential beggarliness of this complaint of employment as slavery. Its first postulate is that material comfort must be had at all hazards. Tom Hood's seamstress stitching in her garret is an appalling figure. But would you rather be Emmeline living with Legree? It will be acknowledged that the position is somewhat different, whichever is preferred. One cannot acquit—(with diffidence be it spoken)—the great names of Ruskin and Carlyle from some responsibility for the confusion of thought which has attained such a rank growth since their day. Anxious to emphasize the dehumanized character of much modern industrialism, they have brought out the comparison between the compulsion of circumstances and the compulsion of the overseer in so marked a way as to obscure

the real distinction. Carlyle's vigorous summing-up of the Nigger Question ran :—

"PETER of the North (to PAUL of the South) : ' Paul, you unaccountable scoundrel, I find you hire [!] your servants for life, not by the month or year as I do ! You are going straight to Hell, you—— ! '

"PAUL : ' Good words, Peter ! The risk is my own ; I am willing to take the risk. Hire you your servants by the month or the day, and get straight to Heaven ; leave me to my own method.'

"PETER : ' No, I won't. I will beat out your brains first ! ' (*and is trying dreadfully ever since, but cannot yet manage it*)."<sup>1</sup>

The picturesque comparison would, we may be sure, have been quietly laughed at, if the Ecclefechan " striking masons " of Carlyle's ancestry had been claimed as " slaves " on the strength of it. In fact, the great Scotsman acknowledged in later years that he had perhaps taken a wrong view of the whole question which culminated in the American Civil War. Annandale's Homer—Whistler's Carlyle is curiously like the traditional bust of Homer—was not incapable of nodding.

In bringing out the fact that the wage-earner does not work for pure fun, the equally essential fact is neglected that it is different to be beaten to work and to be led to work by the play of complex social forces. The outward aspects of life go on in the same way under a free constitution as under a grinding despotism. Ships are unloaded, men are born and die, bridges are built, there is buying and selling, the earth is cultivated, physicians, lawyers, goldsmiths and philosophers ply their trades. The difference is subtle and psychical. A rough analysis, concerned with external things, neglects it. A policeman here, an empty house there, make little or no difference to the picture. So it is with the one-sided analysis which

<sup>1</sup> *Ilias (Americana) in Nuce* : apud *Macmillan's Magazine*, Aug. 1863. See *Essays*, VI. 345, note.

lightly confuses slavery with wage-earning, and pacific penetration with warlike conquest.

"Economic slavery" is only another name for freedom. "Pacific penetration" is tribute rather than conquest. So long as a nation is coherent and sane, "pacific penetration" is only formidable when it is backed by the menace of rifles. In that case the name is a mere decent cloak for warlike coercion. Of itself it has no terrors for the weakest state.

It is a very real danger, however, when thus backed by the menace of war. It is not likely that any country would force war upon another because its people refused to do business with it, in spite of all facilities. But it is extremely likely that the settlement of foreigners in a country under the protection of vague and ambiguous treaty clauses, which may be read as entitling them to an absolute guarantee for all that they choose to consider their personal and proprietary rights, may provide grounds of friction and quarrel which may very easily have their issue in war. As we have seen, the position is very little better, if indeed it is any better, apart from treaty. It ought clearly to be laid down exactly what is the obligation which a nation undertakes towards the strangers within its gates. Few would, on consideration, seriously argue that the obligation is to treat them with an excessive leniency.

It will probably be concluded that sentiment and treaties have gone too far in according a highly privileged position to strangers.

A nation does not particularly desire an influx of foreigners. It is intolerable that it should be compelled, not only to receive them, but to treat them as the apple of its eye. For riots it has been held responsible, for highway robberies, and for the acts of subordinate authorities acting within the limits of their legal freedom. And though it has repudiated liability in such cases—has even done so in cases

precisely analogous to others in which it appeared as the complainant (an attitude particularly in favour with the United States)—the resulting uncertainty is as bad as, or worse than, an acknowledged over-strictness. What is the remedy ?

## CHAPTER III

### PENETRATION (*continued*)

No particular standard of average good treatment can be specified without entering into minute details and laying down rules which could only prove a constant source of friction. Besides, in states where the rough virtues rather than the polished are cultivated, the standard of foreign comfort would be an unfairly high one. It is little better to lay it down generally that the foreigner must enjoy equal protection with the native. Protection for what? He comes to the country with a different set of rights and ideas. To enforce recognition of them as they stand would be to enforce upon a nation the adoption of a code of private international law, and private international law of an extraordinary and unheard-of kind. To enforce recognition of them as if they had been created in the new country is artificial, is always dubious, and may be impossible. Nor, again, is it entirely fair that the people of the country, who may have to fight for it, should of necessity enjoy no greater private-law privileges than aliens, who cannot be forced to do so.

The net result seems to be that progress must be made gradual. Foreigners originally had no rights. They must now have a definite minimum of rights, definitely protected. The careless assumption of statesmen that there is a common international law of personal and proprietary rights must be examined, and the content of such a common law, if any exists, definitely ascertained. Such works as that of Professor Jitta on Obligations will be found of great use in this connection. It will probably

be found that the protection must be limited to securing the commorant foreigner against harm inflicted by the government or its agents (including the legislature) without some ground which, though it may not commend itself universally as adequate, is nevertheless not such as to be universally condemned as capriciously cruel. *Ex post facto* legislation does not seem to be intrinsically objectionable, provided that it is in accordance with the current of national feeling, and not such as to operate as a trap. A foreign lady, retaining by her own law her foreign nationality (*e.g.* a Louisianian), divorced by Act of Parliament and deprived of settled property, could not complain of ill-treatment. In short, our guiding principle must be, that a person who goes abroad accepts the risks of his action. He does not expect to be cruelly treated, but so far as the foreign country has peculiar views which lead it to treat particular practices or opinions with what would otherwise be cruelty, he includes such treatment in the risks. He knows that in Russia it is usual to deal harshly with conspirators, that in Paraguay it is—or was—not safe to speak against the Jesuits, that in England parents are sent to jail-slavery for not keeping their children clean. It is hardly too much to say that no harshness can be complained of, if it is embodied in impartial, and not obsolete, law. We refer to a despatch of Mr. Marcy's<sup>1</sup> for a neat statement of the proposition:—

“Every nation, whenever its laws are violated by any one owing obedience to them, whether a citizen or a stranger, has a right to inflict the penalties incurred upon the transgressor if found within its jurisdiction. The case is not altered by the character of the laws, unless they are in derogation of the well-known International code. No nation has a right to supervise the municipal law of another nation, or claim that its citizens or subjects shall be exempt from the operation of such code if they have voluntarily placed themselves under it. The char-

<sup>1</sup> 54 S.P. 467, Marcy to Jackson, 10 Jan. 1854.

acter of the municipal laws of one country does not furnish a just ground for other states to interfere with the execution of those laws, even upon their own citizens, when they have gone into that country and subjected themselves to its jurisdiction. . . . The principle does not at all interfere with the right of any state to protect its citizens, when abroad, from wrongs and injuries—from arbitrary acts of oppression or deprivation of property, as contradistinguished from penalties incurred by the infraction of the laws of the country within whose jurisdiction the sufferers have placed themselves."

This leaves open the questions—what is "arbitrary"? what is "oppressive"? and what is "property"? But it concedes fully that the very widest limits are to be allowed to local legislation. Difficulties, however, begin to appear in two directions, which make this principle less valuable than it would at first sight seem. The foreigner's government may contest the facts: and it may challenge the propriety of the way in which any discretion which the law gives to the government has been applied. The former course almost necessarily involves a reflection on the good faith or *loyauté* of the tribunal, or on its capacity and impartiality. Judicial independence is regarded by common consent as so valuable a thing to all nations, that a deliberate decision, or suspension of judgment, by a constituted court must stand, unless it can be shown affirmatively that the tribunal was biassed or incompetent: and even this must, for the same reason, be sparingly done. The bias must be glaring and the incompetence gross. In attacking the foreign court, the complaining state casts a breath of suspicion on all courts. Where, therefore, no such obvious imputation can be made, there can be no possibility of requiring the government to disregard the finding of its own courts. Where it can be made and sustained, the state is liable for the misconduct of its judges, though they are not organs of its will like ministers and generals.

And it is here that one grave danger lies. It is easy conscientiously to believe in the corruption or inefficiency of a magistracy who are working in a *milieu* totally unfamiliar to oneself—with whom one has no personal intercourse—and whose decisions adverse to one's countrymen cause more stir than their favourable ones. Happily, it is recognized on all hands that a miscarriage of justice must be due to the most patent, inveterate and gross misconduct before hands may rightly be laid upon the ark of judicial independence.

The principle of judicial independence is sometimes invoked to cover cases which it does not properly include. Suppose that the government instructs its officer to commit an illegal action, can it ask the governments of foreigners who are injured to stand by and watch its own courts whitewash it? This is by no means the meaning of the doctrine.

The true principle is, that where it is the action of the courts that is complained of, or executive action ancillary to their process, whether preliminary or in execution of decree, no valid ground for interference is raised, unless the tribunal is clearly corrupt. But where it is the act of the executive or its officers that is complained of, apart from judicial proceedings, it will be no answer, in principle, to say that such proceedings relative to the matter in question are pending, or have terminated in any particular result—though it may be a valid ground for urging delay until the result of those proceedings is known.

In those difficult cases (common in Anglo-American law) in which the acts of the executive and the judiciary are interwoven, and forcible steps are taken by the executive which are at one and the same time the initial stages of judicial proceedings by them, and the grounds of possible judicial proceedings against them, it seems best to regard the executive acts as merged in the judicial. It is impossible to regard the executive act in two aspects.



If, substantially, it is intended to lead up to a regular judicial process, it is internationally immaterial that it may also by municipal law be complained of as a mere trespass.

The other point is of less immediate importance. Its interest is really theoretical. It is only a warning that the effective law is not necessarily the written code or statute-book. A law giving in general terms power to the executive to deport, imprison and sell up a person whose continuance in a particular district is considered dangerous might be very oppressively exercised: and the harshness, not being definitely exacted by the law, could not be justified. It might well be otherwise, if it were exercised on well-known lines; as such a power might be in Russia. *Per contra*, a definite penalty denounced by law, but never in fact applied, or never in anything like an approach to its full severity, might form the subject of a fair complaint, if otherwise objectionable.

So much for the liability of the state for the acts of itself, its agents and organs. As for the acts of rioters and private persons, it is impossible to conceive with any show of reason why the state should be responsible for these. Surely it is sufficient for foreigners to be admitted into the territory, without being guaranteed a safe and pleasant residence there! If a state likes to take no precautions against fire, pestilence, flood and tempest, it is perfectly at liberty to stand still. If it does not care to root out robbers and brigands, that appears to be its own affair. If it likes to indulge in Fourths and Twelfths of July, really it is a foreigner's evident duty to put up his shutters. If it cannot at once control a mob, it is surely in no worse case than if it finds itself confronted by a revolution. Obviously, no state will pay for the acts of insurrectionists who are bent on upsetting its constituted authorities. There is no logical reason why it should pay for the acts of individuals who are only engaged in disregarding them: unless indeed the riot is

distinctively anti-foreign, in which case different considerations apply. A government must not allow the concession it has granted to be directly set aside by popular violence.

It is possible that by great supineness in the face of other rioting, a state might become liable for subsequent damage done. But the line must be drawn with a generous hand. To demand instant activity and energy would be to demand that the foreign state should be well governed. And that would be a patent interference in its internal affairs. Every allowance must also be made for its want of means for dealing with popular violence. It is not bound to have soldiers in sufficient force ready at call, nor to have a readily available means of organizing local resistance. And it may be a valid argument on its part, that it is hampered by constitutional restrictions and the absence of legal powers. It is a fallacy to say that if it has not full legal powers for suppressing disturbance, it ought to have. For its obligation—(such as it is)—is not absolute, but is measured by its capacity: and it is more than sufficient for it to say that it has used its best efforts. It ought to use its soldiers, if it has any, but it is not bound to have them. It ought to use its legal powers as against subordinate provinces, if it has any, but it is not bound to have them. Here, again, a different standard may be applied in the case of riot which is specifically anti-foreign.

Some recent treaties have put what is conceived to be the rule of law into the form of a stipulation; thus Germany promises, in 1892, not to hold Colombia responsible for injuries, annoyances and exactions suffered by reason of “*soulèvements et guerres civiles de la part d’insurgés ou de bandes révoltés*,” except in cases of negligence.<sup>1</sup>

A similar clause is said to have been stipulated by Colombia with France (1892), Italy (1894) and Peru

<sup>1</sup> Cited, v. Bar, apud *Revue de Droit international* (1899), 465.

(1870) : and between Mexico and France (1888) ; Paraguay and Italy (1893) ; Spain and Ecuador (1889) and Spain and Honduras (1894).

The conclusions of the Institute of International Law (Neufchâtel, 1900) were to recognize ' a right to damages arising out of riots, insurrections and civil war only in those cases where—(1) the violence is directed against the complainants in their quality of foreigners ; (2) the violence consists in closing a port to exit or entry without notice ; (3) the violence is the illegal act of an administrative authority (even of an insurrectionary authority) ; (4) or an act contrary to the laws of war.<sup>1</sup> Foreign residents in a state which has been recognized as belligerent may find their claim barred. And that is equally the case if they provoked the injury. There is a highly ambiguous exception also for cases where the foreigner entered the country knowing that it was in a disturbed state,<sup>2</sup> or liable to the inroads of savages. A further pious opinion is directed against the clause by which states sometimes bind themselves not to complain of denials of justice or of violation of justice or international law. States, the Institute thought, ought instead of this to exclude foreigners altogether. Why should they, if the foreigners are willing to take risks ? Brusa shows that to put insurrectionary damage on a footing with expropriation is to confer a privilege on the individuals injured. For the gross wealth of the nation

<sup>1</sup> In accordance with v. Bar's article, *Rev. de D.I.* (1899), *ut supra*.

<sup>2</sup> 17 *Annuaire*, 91, 96 ; 18 *ib.* 27, 233. See Brusa's report, at the first citation : it is somewhat discounted by *a priori* theories of constitutional law assuming an absolute right of individuals against the state, which, however desirable, is not in accordance with the present stage of evolution : and on an equally uncertain theory of the mission of the " *état moderne* " to carry its hand into foreign places, where its brain cannot very well accompany it.

<sup>3</sup> " *Que des troubles y ont éclaté.* "

is diminished by the struggle, and thus a full indemnity represents a premium. A state may well desire to retain the absolute power of apportioning indemnities in its own hands, free from criticism by foreign gunboats. The object of the clause is not to enable the state to commit injustice, but to place the appreciation of what is just entirely within its own competence.

The Institute thus rejected the idea of Fauchille and Brusa, that all loss sustained by individuals in riot or civil war is matter of full compensation as of right. V. Bar quoted Bismark—"When you go abroad, you go at your own risk and peril." Indeed, the conduct of Germany in requiring compensation has generally been particularly correct. It should be added that the paragraph relating to responsibility for insurgent authorities was only adopted by a narrow majority (twelve to nine).

Sometimes a disposition is shown to exact a full indemnity if, through default of the government, penalties are not enforced on private wrong-doers. This seems a mistaken course. Either the government was responsible for the acts of private persons, or it was not. If it was not, then the measure of its liability for failing to penalize them has little or no relation to the amount of injury sustained. Mr. Hay, however, acted on this theory in 1904. He paid £100 to a Mexican, wounded in Texas<sup>1</sup> by a person who could not be duly tried: and he extorted 78,607.82 pesos from Honduras, on account of a peculiarly gross outrage by private persons, in respect of which he did not think that sufficiently serious penalties had been awarded, the prisoners being allowed to escape.<sup>2</sup> The real ground, however, in the latter case, seems to have been that the dilatory procedure indicated complicity in the crime, at any rate on the part of local officials. In a case, the circumstances of which are almost exactly parallel, Italians were subjected to

<sup>1</sup> *For. Rel. U.S.* (1904), 482.      <sup>2</sup> *Ib.* 363.

murder and outrage in Mississippi; no one was punished, and no compensation was paid.<sup>1</sup>

What rights of the foreigner are to be thus protected against arbitrary invasion by the state, or, in this far less degree, against infringement by the individual?

This is, indeed, the crucial question. We must answer it on the very broadest lines, avoiding the introduction of any subtle ideas of legal right attached to the conceptions of any particular legal system. First and foremost, there are the foreigner's physical person and his mental balance. Harm to these may, obviously, be capriciously cruel. Injuries to his honour must probably be ruled out, unless in those exceptionally gross cases where an outrage is perpetrated on the actual person of the complainant. It is too delicate a thing to be withdrawn from the absolute discretion of a state. The state must have complete discretion as to its words and acts in its domestic affairs. If a local official chooses to proclaim publicly that a foreign agent is a thief and a robber, and the government refuses to interfere, it would appear to give undue freedom of interference to outside parties, to treat the case as affording the foreigner's government a just ground of anything more than friendly remonstrance. So in the case of diminution or deprivation of particular advantages,—exclusion from particular places or dealings;—this can hardly be represented, in any event, as capricious cruelty, unless it should consist in exclusion from access to the foreigner's own property or from intercourse with persons particularly connected with him, in which case it would rather resemble deprivation of or interference with his goods and family. It is in regard to such deprivation or interference with goods that the most acute question arises. To interfere with goods is a matter of perfectly material and visible ascertainment.

<sup>1</sup> *For. Rel. U.S.* (1900), 731.

Such interference may well amount to capricious cruelty. But it is much more difficult to say that it does, than in the case of injury to the person ;—states are so well accustomed to help themselves to their subjects' property. And, beyond that, there is no difficulty whatever in determining what is A.'s body ; whilst there is endless scope for argument as to what are " his " goods. The state into whose territory he brings them may well hold that it has rights in them of which it can arbitrarily avail itself when it chooses. It is hard to see what answer to such a claim can in theory be made.

Otho of Greece once deprived Mr. Finlay (the historian of the Greek kingdom) of a piece of land adjacent to the royal garden. This exceedingly unfair and high-handed act was thrown into the scale along with David Pacifico's grievances by the British Ministry. But there seems to be little difference in principle between such an action and the expropriation of a person's land for the public service at a paltry compensation. It is very unfair ; but impossible to complain of without hampering and embarrassing all such proceedings, however regular and generous. It is not a sort of thing of which foreign nations can make themselves acceptable judges. A state must have liberty to be unfair, to be ungenerous to the point of spoliation, within its own limits.

Contracts, again, it is now universally admitted by the best opinion, are not to be enforced by one state in favour of its subjects against another. The Drago doctrine was only feebly opposed in argument at the Hague Conference of 1907 by the delegates who preferred to support the United States position, and to admit that states can by force exact debts due by other states to their subjects, if they can persuade a majority of arbitrators to agree with them as to the justice of the demand. It was felt that the foreigner who lends his money to a foreign state takes the risks of his action, and ought to support them. Consequently the American view appears to be considered

a retrograde one: one state ought never to be allowed to treat the non-payment of a contractual demand of its subject as a cause of war. This attitude of the foremost publicists of the time goes far to prove that—in the absence of treaty—injury to or confiscation of goods is no cause of complaint. For a breach of contract may be as serious in its consequences as any destruction of property. In the case of property, however, there is the possibility of its having for the foreigner who lays claim to it an “affections-interesse” which may render its seizure or destruction obnoxious to our general rule.

Difficult questions arise as to what are known as “concessions.” These seem to be contracts: and as such to fall under the general principle that their execution must rest in the discretion of the state which has entered into contractual engagements. It is only by a metaphor that they can be styled “property.” Debts themselves are capable of being metaphorically labelled as such. The concessionaries will in most cases, however, have some tangible property,—mines, railway plant, or the like,—and if the government illegally proceeds to confiscate this, no doubt a question of indemnity might arise. In the “New York and Bermudez Company” case,<sup>1</sup> the United States showed an inclination to go further, and to invite Venezuela not to enforce legal forfeitures so as to inflict disproportionate losses. Clearly, this would be to insist that a special rule of Anglo-American chancery law should be of universal obligation.<sup>2</sup> In the case of a U.S. contractor in Guatemala, the British Minister Jenner arbitrated in 1900, and awarded over \$80,000 damages<sup>3</sup> for his arbitrary dispossession without process of law.

<sup>1</sup> *For. Rel. U.S.* (1905), 1003, Root to Russell, 10 Nov. 1905.

<sup>2</sup> *Ib.* 1014.

<sup>3</sup> *Ib.* (1900), 648. Mr. Jenner refused to entertain evidence which implied the imputation of a criminal offence (smuggling) to an individual.

Incorporeal rights such as monopolies, administratorships and the like, are with difficulty treated on the footing of tangible goods.

Interference with family relations might form an interesting subject of study, if the point were not largely academic. The child of a British subject is not necessarily a British subject—and even in the cases where parent and child are British, it is difficult to see how their separation could be alleged as a complaint against a foreign government. Suppose that a government insisted on the stranger's child going to a national school and learning the national language; no state is in a position to complain of that. And the step is short from that to the assumption by the foreign state of the entire control of the child.

Lastly, there comes interference with the liberty of free locomotion. Probably a long and rigorous imprisonment might (though not causing positive pain or injury) be capable of coming within the class of actions which may conceivably be so capriciously cruel as to be inadmissible. But certainly no ordinary imprisonment can have that effect. And we must always bear in mind that the effect of determining that a particular kind of harm is within our principle, is not to make it wrong to inflict it—but to let in an inquiry as to whether it was inflicted with capricious cruelty. Some kinds of harm are outside the limits of foreign cognizance: not because *de minimis non curat lex*, but because a nation cannot be fully master in its own house, if foreigners are to decide for it how it shall behave. Other kinds are within those limits: they may be justifiable, or they may not, but a state may rightly be called on to justify them. But such cases must be kept very rigidly limited, and we think they are rightly limited so as to exclude all monetary and almost all moral damage, and to include cases of bodily hurt, injury, outrage and (in grave cases) restraint.

It will readily be seen that harm can be done to a



person's character and goods almost as effectively whether he is outside the territory or within it. Contracts with him can be, and generally are, broken in the former posture of affairs. But physical harm can only be done to him if he is personally present. Therefore, when the problem is presented as a question of the limits to which a state may go in dealing with a foreign resident, the question tends to centre in the treatment of his person. It is forgotten that the treatment of his goods, his character, his contracts, remains to be discussed, apart altogether from his personal presence. And it may be well to assert, lest a contrary impression should gain ground, that his goods and his character are, *quoad* the territory of any given foreign nation, as much at its absolute mercy as his contracts. As to his person, modern tenderness imposes a slight but real limitation.

We must now pass for a moment to the question of the operation of treaty rights. In the usual case in which the territorial sovereign has guaranteed to the subjects of another protection for their persons and property, it may be gravely doubted whether the effect is to extend the common law principle as above outlined. It is merely to say that foreigners within the terms of the treaty will not be subject to gratuitous molestation. Within the law of the land, treaty or no treaty, they must expect to fall. Within that law, as it may be altered so as to prove prejudicial to their interests, they must expect no less to fall. Perhaps the main advantage of the treaty is to make it impossible to legislate against foreigners of the particular nation *as such*, so as to affect their personal safety: an advantage which can generally be reduced to very modest dimensions by a little ingenuity.

Do such treaties go further, in guaranteeing foreigners in the enjoyment of their "property"? In the absence of a definition of property, it would be difficult to say so. Our conclusion was, in respect to the common law as to goods, that a state could confiscate them, as it can repudiate

debts, without being bound to assign a reason. Its express agreement not to seize them cannot amount to a waiver of all rights over the goods of foreigners within its jurisdiction. It can certainly tax them: it can certainly requisition them for the public service—military contributions apart; and it is very unlikely that it can be bound to state expressly why it felt obliged to take that step. The treaty clause, therefore, means something very vague. And it seems to be this—not that the foreigner is intended to be put in a privileged position of inaccessibility in purse and person, but that he is meant to be put on an equality with the native, and his goods made no more and no less liable to seizure than theirs. But suppose that theirs are liable to absolute confiscation or requisition—as would be the case in Great Britain, or in any country where a legal absolute sovereignty exists: then it must be taken that this sovereign right will in practice be enforced with equality. There are very great difficulties in the way of applying that principle.

There is the standard difficulty of deciding whether equality means equality proportionate or absolute. Is the adult treated equally with the child, when he gets an equal ration? Is the foreigner in some particular circumstance of obligation—(say, the occurrence of a riot in a district where he is the largest ratepayer)—treated equally with the native when he is forced to pay the extraordinary contribution that a native would have had to pay in his place?—or must all the natives help him to bear it? for if they do not, he is paying something which in point of fact they do not pay, since they may never be in the same special situation. And then there is the old difficulty to which reference has already been made,—perhaps it is ultimately the same difficulty,—that you cannot always say how a native would have been treated, since a native could not have been in precisely the same position, for the simple

reason that he is a native and not a foreigner, and has a different history. A Colombian comes to England with slaves. Is he to be absolutely protected in his "property"? If not, is he to be protected so far as an Englishman in his place would be protected? It is impossible to attach any meaning to the last question. An Englishman *could* not be in his place.

One further point we may mention before closing, more as a matter of curiosity than anything else. The question of the peculiar liabilities, if any, which a state incurs by reason of admitting a foreign potentate within its borders, has been treated in a special monograph by Mr. M. Ferrigui. The true conclusion appears to be that no such special liabilities are undertaken. Insult to, or assault upon, such a prominent foreigner can, however, hardly escape from coming within the denomination "anti-foreign." As such, they would require specially vigilant suppression and penalties.

## CHAPTER IV

### ILLUSTRATION

WE now proceed to offer a detailed enumeration of the principal cases in which the losses sustained by foreigners have formed the subject of reclamation by their governments.

It should be premised that some of these cases, especially those of the middle and end of the last century, are instances of a powerful state's holding a smaller state responsible for injuries sustained within its borders. Such cases must be handled with caution. International Law has no immunity from being occasionally broken, and it is oftenest broken against the weak. Its true precepts are best to be gathered from the behaviour towards each other of approximately equally powerful nations. None of its principles is better established than this, that the rights of the largest states are equally the rights of the weakest. So that, if we find a great power behaving in some particular towards a small power as countries of equal resources are not accustomed to behave among themselves, we do not conclude that no law exists in the premises, but that the known law has been violated: perhaps rightly violated. At the same time, few things are more conspicuous or more gratifying, than the scrupulous care and forbearance which, in general, important states exhibit when pressing their claims upon their less fortunately circumstanced neighbours.

With this caution, we proceed to particulars.

Correspondence will be found at p. 958 of the *British*

*State Papers*, Vol. 28, regarding the efforts made on behalf of Spanish, Greek, Mexican, Central American, Colombian, New Granadan, Venezuelan, Ecuadorian, Peruvian, Buenos Ayrean and Chilian bondholders. We quote the following :—

“ Mr. Secretary Canning has received your letter of the 1st inst., requesting that H.M. Government would make a representation to the Government of Spain, calling upon them distinctly to acknowledge the loans contracted for with that country by British subjects ; and I am directed by Mr. Canning to reply to you, that he does not consider it as any part of the duty of the Government to interfere in any way to procure the repayment of loans made by British subjects to foreign Powers, States or individuals.”<sup>1</sup>

Lords Palmerston and Aberdeen departed from this clear-cut rule, to the extent of urging the propriety of satisfying such claims as a matter of favour. Aberdeen's view was expressed thus :—

“ Although H.M. Government are not, in strictness, called upon to interfere in operations of this kind, which are of a purely private nature and upon which, as a matter of right, they cannot claim to exercise any authoritative interference with foreign States, they are nevertheless far from viewing with indifference the interests of the numerous individuals involved, . . .,”<sup>2</sup> and would instruct their envoy to use his friendly offices.

In 1821, a Chilian squadron seized specie mainly belonging to U.S. citizens on board the *Macedonian*. Belgium arbitrated, and in 1863 awarded three-fifths of the sum seized to the States, with 6 per cent. interest.

During the Portuguese disturbances of 1828, Sir J. M. Doyle and three other British subjects were imprisoned. Mr. Matthews, the British Minister at Lisbon, demanded

<sup>1</sup> *Ib.* 961, Planta to Cairncross, 4 Nov. 1824.

<sup>2</sup> *Ib.* 967, 25 March 1830.

their release, but Lord Aberdeen limited himself to an expression of "deep concern" that they should have been detained in "unhealthy and loathsome places of confinement,"<sup>1</sup> and to an instruction to present a "serious remonstrance." Later, he declared that the treatment meted out had been "most arbitrary and oppressive," and that the government would "require full and immediate satisfaction and reparation for any injuries *contrary to the Laws of Portugal*," which might have been sustained.<sup>2</sup> Mr. Matthews was to secure "a speedy and impartial administration of the Laws of Portugal." (A field officer of police, on 9 Aug., struck Sir Augustus West and broke his ribs, but absolutely no notice seems to have been taken of it.) The prisoners Doyle and Young were tried by the British Judge-Conservator, and sentenced to exile on 6 Sept.

Other cases immediately arose. One Ascoli was imprisoned on 14 Sept., and a youth named Noble a few days previously. Communication with visitors was during the first month refused them. Ascoli was condemned to exile,<sup>3</sup> and the Portuguese Minister admitted irregularity in the process, as he should have been delivered to the Judge-Conservator in pursuance of treaty. The charge against him seems to have been political freemasonry. That against Noble (condemned to exile on 7 April 1829, but pardoned) was corruption of the soldiery. Lord Aberdeen, admitting that some consideration might perhaps be due to the unsettled state of the government and the natural apprehensions of the party in power,<sup>4</sup> asserted that the charge against Ascoli was so futile as not to justify his detention under any circumstances. He demanded compensation for Ascoli at the moderate rate of \$8 per day, his release within thirty days, and a

<sup>1</sup> 18 S.P. 49.

<sup>2</sup> *Ib.* 50, Aberdeen to Matthews, 30 July 1828.

<sup>3</sup> *Ib.* 70.

<sup>4</sup> *Ib.* 77, Aberdeen to Matthews, 5 Nov. 1828.

censure on the police authorities, in which however he did not wish any particular severity displayed.<sup>1</sup> A Mr. Macrohon was arrested, but released after twenty-four hours' detention (of which no complaint was made). The Hamburg Vice-Consul (a Portuguese) was arrested and imprisoned at St. Ubes. Ascoli's lawyer was imprisoned. The British Vice-Consuls were dungeoned at Tavira and Villa Real. (The former was released 4 Feb. 1829.)

Ascoli was still in prison in 1829, and was virtually ruined when, on 13 Jan. 1829, his final appeal failed. Two days later a Mr. McKenna was set upon and wounded at Lisbon, but the military arrested his assailant. Lord Aberdeen now declared to Portugal that "if these excesses should continue and the Portuguese Government still be unable or unwilling to repress them," Britain would be compelled to send ships to the Tagus:—to land an expedition? Not at all;—to carry out the much more dignified and proper course of "enabling the British Consul and residents to leave a country where no treaties are sufficient to protect them from insult and aggression."<sup>2</sup> That is the tone of the victors of Waterloo. As to Ascoli, they did not dispute his eventual sentence. But for his prolonged, secret, and illegal detention they insisted on his \$8 a day,<sup>3</sup> and Portugal was only too pleased to pay it<sup>4</sup> and to censure the police. The moderate amount of compensation is particularly noticeable, in view of the swollen sums claimed in more recent times.

The main subject of complaint was the disposition of the Portuguese to withdraw cases from the jurisdiction of the Judge-Conservator. Two British subjects, Story and Fregoaz, were treated in this way, later in 1829, being detained in secret and in ignorance of the charges against them. They were so imprisoned for three or

<sup>1</sup> 18 S.P. 91.

<sup>2</sup> *Ib.* 105, Dunglass to Matthews, 5 Feb. 1829.

*Ib.* 106, Matthews to Santarem, 7 Feb.

<sup>4</sup> *Ib.* 109.

four months before the procrastination of their jailers gave way.

Throughout 1830 there appears to have been little complaint. In 1831 a British merchant's rope factory was roughly searched and the foreman maltreated and imprisoned.<sup>1</sup> The Danish Vice-Consul was arrested. The foreman was liberated after ten days in jail, and an official reprimand was issued to the actors in his ill-treatment.<sup>2</sup> Compensation (200 milreis) was demanded and conceded.<sup>3</sup> Palmerston pressed for the removal of the authorities responsible in these cases, and in that of a British subject whose house was, contrary to treaty, searched.<sup>4</sup> Reprisals were threatened by H.M.S.S. *Briton* and *Childers*, and the demands were complied with. It must be remembered that in all these cases there were express treaty provisions directed against the very acts complained of.

Afterwards (15 July) a Mr. Milne was attacked, and (18 July) a consulate officer and a Mr. Lowley: no doubt these incidents were provoked by the French attack upon Lisbon then proceeding. On 6 Aug., two officers of the *Briton* were beaten by the peasantry and robbed, under the idea that they were French officers. A Mr. Gravely was mauled as a Frenchman by soldiers on 22 Aug., receiving five bayonet wounds. The British Minister admitted that some of these events were due to imprudence on the part of the assailed,<sup>5</sup> and it does not appear what, if any, satisfaction was made for them. Perhaps the fall of Miguel blotted them out.

The French difficulties with Portugal arose out of similar events.<sup>6</sup> We need not go into the case of Bonhomme.<sup>7</sup> Another case was that of Sauvinet, banished for ten years to Africa. Both sentences were in conformity with law; in both there was at least some very cogent evidence. The French demand was entirely against the principle of

<sup>1</sup> 18 S.P. 207.

<sup>2</sup> *Ib.* 215.

<sup>3</sup> *Ib.* 247.

<sup>4</sup> The cases are detailed at p. 251 *ib.*

<sup>5</sup> 18 S.P. 395.

<sup>6</sup> *Ib.* 395 *et seq.*

<sup>7</sup> See the details, *ib.* 377.



judicial independence: so much so, that it actually extended to the dismissal of six judges without any attack on their impartiality. It included sums of frs. 20,000 for Bonhomme and frs. 15,000 for three other Frenchmen, detained and expelled contrary to the treaty privilege of trial by a Conservator.<sup>1</sup> These demands were conceded after the short war of 1831.<sup>2</sup>

On the occasion (in 1829) of French subjects being enrolled in the Argentine Unitary forces, the reply was made that they were militia, destined for "passive defence." Since the British had a treaty by which they themselves were exempt from military service, the French Consul-General tried to construct a dilemma for the Argentines. If the service was not military, the English should be included in it. If it was, the French should be exempt. The Argentines then justified the measure as necessary for all Buenos Ayres—"pour défendre, contre les barbares, leurs vies, leurs propriétés et l'honneur de leurs familles." Finally the Consul demanded his passport and quitted Buenos Ayres,<sup>3</sup> and the French Admiral began to seize vessels belonging to that city. In consequence, the French were permitted to escape the militia duty improperly imposed upon them.<sup>4</sup> France pressed for some restriction to be put upon the tone of the newspapers in speaking of his Most Christian Majesty (to be dethroned by herself in thirteen months), but the Buenos Ayres Government disclaimed the power or duty of controlling the press.<sup>5</sup>

The seizure of the Argentine ships was mutually considered as "*de facto* war."<sup>6</sup>

A convent at La Meilleraye in France was suppressed in 1832,<sup>7</sup> and seventy-two British subjects expelled. They were informed that they were entitled to protection "in

<sup>1</sup> 18 S.P. 367.

<sup>2</sup> *Ib.* 395.

<sup>3</sup> 16 S.P. 928.

<sup>4</sup> *Ib.* 930.

<sup>5</sup> *Ib.* 933.

<sup>6</sup> *Ib.* 936. Additional articles to Convention between Venancourt and Gelly.

<sup>7</sup> 22 S.P. 377.

as far as such support could be given consistently with the laws of the country in which they resided." It did not appear that the decree of suppression was issued in contravention of the laws of France, "nor that the execution of this decree was attended with any unnecessary degree of harshness or violence." And therefore Lord Palmerston declined to interfere.

The Hamburg British complained in this year that since the French wars, they were compelled to perform military service and to become burghers. They were indeed eligible, as such, for the highest offices in the state.<sup>1</sup> The extraordinary admission by Palmerston is on record,<sup>2</sup> that the civil *and* military duties to which British merchants were liable in Hamburg, had been voluntarily incurred by those who, with a knowledge of the existing laws of the state, had chosen to fix their residence there; and that it could not have been expected that any application by H.M. Government for the relief of British subjects from such liabilities would have been successful. The communication which drew forth this reply from Palmerston was resented by the Hamburg Senate. The six merchants who made it were indicted and reprimanded. No objection to this was taken by Great Britain: in fact the government interceded with the Senate for leniency.<sup>3</sup>

Belgium, in 1834, was about to pass legislation decreeing indemnities to natives who had sustained losses during the revolution of 1830. Foreign nations put in claims to participate, which effectually stopped the matter from proceeding further.<sup>4</sup> Intermittently, the subject was renewed. Palmerston wrote in 1836<sup>5</sup> that—"as long as the Belgian Government took no steps to indemnify its

<sup>1</sup> 22 S.P. 1163.

<sup>2</sup> *Ib.* 1166, Shee to Edye, 14 April 1834.

<sup>3</sup> 23 S.P. 1239.

<sup>4</sup> *Ib.* 482, Adair to Wellington, 17 Feb. 1835. De Leval states that the bill was eventually passed, in a form conferring the right to indemnity upon *residents*.—*Report, 24th Conference of the International Law Association*, p. 210.

<sup>5</sup> 30 S.P. 214.

own subjects for similar losses, His Majesty's Government did not feel justified in pressing for a decision in favour of British subjects, *who could only be entitled to be placed on the same footing as Belgian subjects.*" The Prussians were making a claim as well, and by 1838 Brazil and the United States were also in the field.<sup>1</sup> In a long despatch<sup>2</sup> M. de Theux repels all liability for the results of hostilities. "Les suites de la guerre flagrante sont des événements fortuits ou de force majeure, dont la responsabilité n'incombe à personne." It would be absurd to force a state to rebuild the houses which its enemy had knocked down. No complaint was made by foreign merchants on the occasion of the bombardment of Copenhagen. To make either belligerent responsible for the losses of neutrals would be to put the latter in an extra-territorial position, and unduly to hamper the operations of war.

These principles have prevailed, and were taken as the basis of discussion at the Hague in 1907. The Powers replied at the moment by saying that the bombardment of Antwerp was an operation of mere civil war.<sup>3</sup> They departed from the claim of equality, and now laid their right to an indemnity on the ground that the bombardment was wanton and irregular.

In 1842, the matter was still unsettled.

Miguel's government being overthrown in Portugal in 1833, Sir J. Campbell, one of his major-generals, was captured on the high seas when leaving that country in a British ship bearing Miguelist despatches. He invoked the assistance of his government. But, Lord Wm. Russell wrote, "when a military officer serves another sovereign his allegiance is to that sovereign, and his rights as an Englishman cease." Lord Palmerston concurred that, although Sir John might in fact have given up the Miguelite cause, yet the Portuguese, finding him in

<sup>1</sup> 30 S.P. 216, 217.

<sup>2</sup> *Ib.* 223.

<sup>3</sup> *Ib.* 231.

possession of that monarch's despatches, "were perfectly justified in considering him still in the public employment of [the Queen's] enemy, and, as such, liable to be detained and treated as a prisoner of war."<sup>1</sup> The Advocate-General concurred in this opinion. Campbell was detained at least eight months, and Palmerston sent a mild remonstrance on his continued close imprisonment, as contrary to the usage of war, on 8 May 1834.

The demands made upon Switzerland and Cracow in 1836 for the expulsion of alleged dangerous refugees hardly come within our province.

During the Carlist War of 1835, a proclamation was issued refusing quarter to foreign Constitutionalists. Great Britain therefore issued instructions whereby her naval commanders were ordered to refuse Don Carlos all asylum.<sup>2</sup> This was a somewhat neat move, but both sides subsequently massacred prisoners. In a previous (1831) attempt of revolutionists to effect a landing in Southern Spain, two British subjects, Boyd and Carter, were captured and shot.<sup>3</sup> They were denied access. Palmerston thought that there ought at any rate to have been a trial, and asked for evidence that the party had not merely been driven ashore.<sup>4</sup> One of the men was alleged to have been a carpenter, carried accidentally with the party, and the British Minister pointed out that he had had no opportunity of proving his innocence. It was impossible, in the sequel, to deny that an armed expedition had been intended, nor that the story of the carpenter was a pure fiction.<sup>5</sup> The matter then assumed a very minor aspect, and further remonstrance was dropped.

Two British subjects (Henningsen and Gruneisen, the *Morning Post* correspondent), captured with Carlists,

<sup>1</sup> 23 S.P. 1263, Palmerston to Russell, 4 Dec. 1833.

<sup>2</sup> 24 S.P. 401.

<sup>3</sup> *Ib.* 827, 833.

<sup>4</sup> *Ib.* 833, Palmerston to Addington, 27 Feb. 1832.

<sup>5</sup> *Ib.* 841.

were actually threatened with death, and although their release was secured, the Spanish commander declared that in future such a sentence would be executed.<sup>1</sup>

In 1836 Peru imprisoned a Chilian envoy, Ventura Lavalle, which was one of the causes of the war which then broke out. It was also alleged that Chilians, unlike other foreigners, had been subjected to military service and forced contributions in Peru; but Chili did not very strongly insist on the illegality of this.<sup>2</sup>

In May, 1836, a U.S. officer who landed at Tampico for the purpose of communicating with the Consul there, was arrested, and his crew imprisoned, or (as the Mexicans explained it) detained temporarily. The commandant wrote a fiery letter in reply to the Consul's temperate remonstrance, and the Mexican Government, anxious to remove any cause of offence, replaced him by another official and promised an inquiry.<sup>3</sup> A long catalogue of petty complaints is drawn up in Forsyth's despatch of 20 July 1836.<sup>4</sup> "The Department," he admitted, "is not in possession of proof of all the circumstances of the wrongs done in the above cases, as represented by the aggrieved parties." All that he asked for was examination. Most seem to have been cases of *angary*: but some were serious outrages. The Mexican Government temporized, and the whole question was referred to arbitration by Prussia; but further difficulties supervened, and it was not until the peace of 1848 that a settlement was reached.<sup>5</sup>

The incident of the *Caroline*, burnt in U.S. territory by Canadian militia as a Fenian transport, is well known. Not so well known is the fact that at that very time the U.S. Foreign Department was urging on Mexico the right of the United States to invade Mexican territory,

<sup>1</sup> 29 S.P. 1225.

<sup>2</sup> 25 S.P. 781, Message of the President of Chili, 21 Dec. 1836.

<sup>3</sup> 26 S.P. 1390.

<sup>4</sup> *Ib.* 1393.

<sup>5</sup> Art. 14. Cf. de Merignhac, *L'Arbitrage international*, § 53.

alleging the very same ground of absolute necessity.<sup>1</sup> It invoked "the immutable principles of self-defence—the principles which justify decisive measures of precaution to prevent irreparable evil."

An American ship which visited Yedo in 1837 was fired on, and forced to decamp.<sup>2</sup>

Great Britain obtained £1,000 in 1837 from New Granada, in return for the imprisonment of Pro-Consul Russell.<sup>3</sup> The Pro-Consul had, according to his own account, been struck in the dark by an acquaintance with whom he had had private disputes, and had retaliated with a sword-stick. The combatants were separated by the local commandant-general, but Mr. Russell was then struck on the head by another person, from whom the commandant again rescued him. He was taken home in a serious state. He was accused of unlawful wounding, and a guard was put in his house (which of course was the consulate). The Alcalde committed the mistake of taking away the archives for transmission to the Consul, who had now arrived, and Russell was condemned to six years' imprisonment for carrying concealed arms. The very careful balancing of the evidence contained in the judgment of the court shows that the case was not decided hurriedly. The court showed a laudable concurrence with the dislike of the knife so often expressed by English judges. The sentence, however, was the maximum one, and cannot but be regarded as harsh in the circumstances, considering the position of the accused. The judge, moreover, was a friend of the complainant.

The government maintained that it had no power to interfere with the due execution of the laws, pending revision by a superior court. Their version of the affair was that Russell was the aggressor, and that the violence he suffered was the violence proper to the apprehension of a dangerous character.

<sup>1</sup> 26 S.P. 1419, Forsyth to Ellis, 10 Dec. 1836.

<sup>2</sup> 25 S.P. 566.

<sup>3</sup> 26 S.P. 128.

Palmerston, on the shaky ground that "it seems established beyond a doubt" that Russell was not the aggressor, and that the Alcalde was biassed, demanded £1,000, an apology for the invasion of the consulate, the release of Russell and the dismissal of the delinquent officials (whom he did not particularize).

This was while the case was still *sub judice* at Bogotá! It will be noted, moreover, that the injuries inflicted on Russell were inflicted by a private person (who eventually was condemned to imprisonment and payment of damages by the spontaneous act of the court). The Governor of Panama pointed out that there were proper and legal means of questioning the magistrate's impartiality, and that there were no legal means of forthwith releasing Mr. Russell. Palmerston having made up his mind *ex parte*, there was no opportunity of bringing these considerations to his notice. His hasty declaration that the action of the local authorities had been cruel and unjust, rightly offended the nation which was thus unnecessarily stigmatized. Unnecessarily, because the Superior Courts were 'ready and anxious to do justice in the matter, and in fact released Russell on 3 Jan. 1837, in due process of law.

"Moral equality between nations becomes null," says Pombo,<sup>1</sup> from the moment in which the more powerful may say to the other that it has been insulted, without explaining in what the insult consists; and that immediate satisfaction will be taken by force, if it be not immediately given,—and in a determined and positive manner, without any discussion." Even the British Minister plaintively refers to the "embarrassing circumstances in which the mission is placed by the pressure of the case, and the impossibility of its receiving further instructions."<sup>2</sup> An Admiral, named, by felicitous anticipation, Peter Halkett, was sent out with a large naval

<sup>1</sup> 26 S.P. 194. See, at p. 203, the conclusive remarks of the Minister, 7 Dec. 1836

<sup>2</sup> *Ib.* 211.

<sup>3</sup> *Ib.* 227, Turner to Palmerston, 11 Dec. 1836.

force, and detained a French and a native brig, on 22 Jan. 1837, under the colour of blockade.

The "blockade" was attended by fatal irregularities. Commodore Peyton "declared" it at Jamaica on 10 Jan.<sup>1</sup> On the 17th he proceeded to enforce it. On arrival in the presumably blockaded waters, he "withheld" the declaration, pending a conference, and re-issued it on the 25th, when the conference failed. But blockaders cannot play fast and loose.

Russell being released, there was no obstacle in the way of a settlement. A compromise was arrived at, by which the £1,000 solatium was paid, but the questions of dismissal and apology dropped. In fact, the British negotiator hardly knew whom he had to get dismissed.

A sulphur monopoly was granted to Frenchmen by Sicily, in 1837, in terms which operated unfavourably on British sulphur merchants there. This was an infraction of the Treaty of 1816, which secures freedom of trade on the footing of the most favoured nation. The delicate question of the validity of a monopoly in favour of individual home merchants was not involved, and it is strange that this expedient was not resorted to. What was next proposed was the imposition of an export duty on sulphur, for the benefit of the French speculators (who were to be exempt from it). In principle, there could be no objection to the export tax. The trade was still open to other nations and other Frenchmen. The limitation of export by the imposition of a tax is (as in the case of the British coal duties) permissible, if not economical. But the exemption of the monopolists was clearly a violation of the equality established by the treaty.<sup>2</sup>

The monopoly was withdrawn, 21 July 1840,<sup>3</sup> but the export duty remained.

Through the mediation of France, a settlement was reached in 1840. The monopoly was abolished: losses were to be ascertained by a commission of two Sicilians,

<sup>1</sup> 26 S.P. 256.

<sup>2</sup> 28 S.P. 1163.

<sup>3</sup> 29 S.P. 1225.



two British, and a Frenchman approved by both sides. The total claims amounted to £65,610 5s. 5d. and were allowed at almost precisely a third of that sum.<sup>1</sup>

At Canton a Chinese was killed by Lascars in an affray in 1837, and the latter were arrested. The British demanded their surrender. The local authorities said that they were in the custody of the Mandarins, charged with a violation of the laws of the Empire : if Englishmen went to France they would have to submit to French justice, and why not to Chinese ?<sup>2</sup> However, the Lascars were given up. Nine British merchants were expelled in a belated endeavour to stop the opium trade, and with it the alarming drain of silver.

"Till the other day," says Superintendent Elliott (2 Jan. 1839),<sup>3</sup> "I believe there was no part of the world where the foreigner felt his life and property more secure than here in Canton" : but a serious state of riot had supervened, "and all these desperate hazards have been incurred for the . . . gains of a few reckless individuals, unquestionably founding their conduct upon the belief that they were exempt from the operation of all law, British or Chinese." The opium-smugglers were "rapidly staining the British character with deep disgrace,"<sup>4</sup> and he ordered their boats away. In March the foreign settlement at Canton was invested, and forced to give up its opium. In the middle of the year an unfortunate riot, occasioned by drunken sailors, caused the death of a Chinese. Attacks were now openly made on two British boats.

A Spanish ship was attacked and destroyed, under the impression of its being an English opium trader. Attacks were then made on the Chinese fleet in its own waters, and the First China War followed.

Undertaking to make Mexico liable for losses caused to Frenchmen in the course of revolutionary outbreaks, Louis

<sup>1</sup> 30 S.P. 111.

<sup>2</sup> 29 S.P. 904.

<sup>3</sup> 25 S.P. 397.

<sup>4</sup> *Ib.* 978.

Philippe sent Admiral Baudin to beset the Mexican coast in 1838. The Mexican position that foreigners could not claim in this respect to be any safer than natives, in a land to which they had voluntarily come, seems justified by good sense, if national independence is to be anything but a fiction. While loudly proclaiming the most lofty sentiments, the Admiral would make no concessions, and invaded the country.<sup>1</sup> In the course of his operations he took a Mexican pilot forcibly out of the British ship *Creole*,<sup>2</sup> for which the French Government apologized.

At Bushire, in 1838, the populace destroyed wine and spirits in the British Residency and ill-treated the owner.<sup>3</sup> Palmerston was content with the promise of suitable penalties being enforced,<sup>4</sup> without exacting the dismissal of any officer responsible for the peace of the town. In 1839 Admiral Maitland imperiously insisted on being allowed to land where he chose at Bushire, without reference to the port authority.<sup>5</sup> Very naturally, he was received with musketry: and the dismissal of the Governor was therefore demanded and conceded.<sup>6</sup> A Persian general had moreover stopped a messenger of the British Minister on his way to Herat, and the man had been mishandled.<sup>7</sup> The interference with this messenger was excused as a measure of self-preservation, and an ample apology was made for it.

France found Argentina as well as Mexico more difficult nuts to crack than Portugal had been. The Argentine Minister laid down in terms that—"L'état de Buenos Ayres est un état souverain et indépendant, et un gouvernement étranger n'a rien à voir à ce que cet état décrète; et si les lois qu'il plaît de créer ne conviennent pas aux étrangers, ils peuvent se retirer."<sup>8</sup> Frenchmen had been forced into the militia. Hippolyte Bâcle had

<sup>1</sup> 27 S.P. 1176 *et seq.*

<sup>2</sup> *Ib.* 197.

<sup>3</sup> 28 S.P. 9.

<sup>4</sup> *Ib.* 153.

<sup>5</sup> *Ib.* 18.

<sup>6</sup> *Ib.* 133. Cf. the Mexican affair *supra*, p. 100.

<sup>7</sup> *Ib.* 74.

<sup>8</sup> 26 S.P. 920.

died after rigorous imprisonment for six months, untried. Pierre Lavie had been, "sur des présomptions insignifiantes," taken from his country house and brought to Buenos Ayres in irons, where he had been detained in secret and without trial for six months also. The French Consul talked of the Argentine adherence to "principes surannés," and the Argentines, with better reason, spoke of its unexampled liberality, in permitting *without* treaty free liberty of residence and trade. Their positions are worth quotation.

"1. Qu'en laissant à chaque Nation la possession pacifique de la liberté qu'elles tiennent toutes de la nature, il leur appartient de juger par elles-mêmes de ce qui convient à leur prospérité et à leur avancement : et qu'elles n'offensent personne lorsqu'elles usent de ce droit pour atteindre un objet aussi important, qui forme le but de toute association.

"2. Que par l'effet de cette liberté chaque Nation a le droit de permettre ou de refuser la libre entrée, et le simple résidence des étrangers, selon l'idée qu'elle se forme des maux et des biens qu'elle doit en attendre.

"3. Qu'il dépend aussi de sa volonté de leur laisser la liberté de s'établir sur son territoire.

"4. Que cette liberté, étant une concession purement gratuite, la Nation peut l'accorder sous les conditions qu'il lui plait de dicter.

"5. Qu'elle peut aussi les engager à en profiter, moyennant d'autres concessions qui lui soient avantageuses.

"6. Que les étrangers, par le seul fait d'accepter la permission qui leur est accordée, et sans faire d'autres démarches, se soumettent de plein gré aux conditions qu'on leur impose, et ils acquièrent en retour le droit aux faveurs qui leur sont promises.

"7. Qu'en conséquence, si l'usage libre qu'ils font de cette permission, leur fait perdre leur nationalité, cette perte n'a rien de forcé, parcequ'elle est libre et spontanée : sans qu'on puisse non plus l'attribuer à la loi, qui les a

engagés par les avantages qu'ils ont bien voulu accepter, et qu'on a laissé à leur choix d'admettre."

The logic of clause 7 probably goes too far. The loss of nationality (and the consequent liability to military service), like cruel and inhuman treatment, can hardly be made the subject of tacit consent. With that exception, the theory of national right could hardly be better put. To this day, the doctrine remains firmly embedded in Argentine opinion. The Argentine (unlike every European Latin system) at this moment regards Domicile as the touchstone of national character for the purposes of Private Law.<sup>1</sup> The Argentine "Drago Doctrine" condemns the violent assertion of the claims of foreign financiers. The assertion of these principles by the country in its weak infancy, against the pretensions of the leading states of the world, is a splendid monument to the statesmanship and devotion of the Argentine pioneers.<sup>2</sup>

Certainly France had little to complain of when she went to war. There were only two Frenchmen in Argentine prisons—one accused of homicide and the other of theft<sup>3</sup>—and six in the army.<sup>4</sup> The individual cases of hardship were trivial. The real question was that of principle. The eventual success of Argentina, after several years of blockade, was an instructive lesson.

Bâcle was, by independent Chilian official testimony, a traitor.<sup>5</sup> Lavie was an army sutler convicted on his own confession of receiving army clothing in pawn. Theirs were literally the only cases, except one complicated and ancient money dispute. Argentina offered arbitration. The French Consul simply told her that she would sooner or later have to give in: that his country would now lend its support to any and every rival faction;

<sup>1</sup> Zeballos, *Bulletin Argentin de Dr. Int. Priv.*, 477.

<sup>2</sup> 26 S.P. 930, Arana to Roger, 8 Jan. 1838.

<sup>3</sup> *Ib.* 964, Rosas to Leblanc, 3 April 1838.

<sup>4</sup> Of whom five were stated to be volunteers.

<sup>5</sup> 26 S.P. 1003.

and that she was preparing a formidable expedition. Relations were suspended for several years, and the treaty by which they were resumed was at least as favourable to the South American as to the European power.<sup>1</sup>

Mr. Webster discusses <sup>1</sup> in 1842 the difficult position to which we have already referred, of two nations differing in their estimate of what is the "property" of a subject of one of them. The slaves of a subject of the United States came within the territory of Great Britain. Was he entitled there to the protection for them due to his "property"? The question is complicated by the circumstance that the slaves were on board a U.S. ship: and, moreover, a ship in distress. Webster maintained that in these circumstances the rights of the slave-owner must be determined by his own American law, except in cases where the local law notoriously took them away.

"A state," he says, "may declare, in the absence of treaty stipulation, that foreigners shall not sue in her courts, nor travel in her territories, nor carry away funds or goods received for debts. . . . Her power to make such laws is unquestionable: but in the absence of direct and positive enactments to that effect, the presumption is that the opposite of these things exist. While her ports are open to foreign trade, it is to be presumed that she expects foreign ships to enter them, bringing with them the jurisdiction of their own government and the protection of its laws." But on the general case (apart from this assumed ex-territoriality of ships, especially in case of *relâche forcée*), he admitted that slaves in British territory cease to be fit subjects of protection as property. In a case of escape—"the territorial jurisdiction of England will have become exclusive over them and must decide their condition."<sup>2</sup>

This amounts to an absolute opinion in favour of the

<sup>1</sup> 15 *Nouveau Rec. Gen.* (2 Samwer) 50: cf. 37 S.P. 7; see also 9 Murhard, 168.

<sup>2</sup> 30 S.P. 181, Webster to Ashburton, 1 Aug. 1842. <sup>3</sup> *Ib.* 188.

local law governing all questions of property (ex-territoriality apart). It is of course subject to the observation that the local law must be known, and not a trap. Webster's authority is high enough to make it almost conclusive.

A British ship proceeded to Hawaii in 1843 to make the following demands:—(1) Restoration to Consul Charlton of land taken up by the government: <sup>1</sup> (2) Acknowledgment of his deputy Simpson as Acting Consul pending the discussion of the Hawaiian objections to Simpson: (3) A salute in apology for not receiving Simpson: (4) Abandonment of the right to iron British subjects for crimes not felony in England: (5) A new and fair trial of a case brought by a Briton against an American: (6) Juries *de medietate linguæ*: (7) Direct access to the Sovereign. Lord G. Paulet threatened an armed attack if these points were not conceded. It is no wonder that the King signed his answer—"Yours respectfully," and proceeded to cede his kingdom to Lord George. That functionary was promptly disavowed by Admiral Thomas, who convinced his Majesty that the Queen's Government "made it a rule never to resort to force until every expedient for an amicable settlement had failed," and that "rather than urge compliance with demands which are likely to embarrass a feeble government, its object is to foster and even assist by good offices such as may be disposed to seek for its friendly intervention, requiring only in return equal privileges" on the most-favoured-nation footing.<sup>2</sup> He repudiated the cession, and declared that H.B.M. left the government entirely to the King.

Admiral Dupetit-Thouars told the Otaheitans in 1843 <sup>3</sup> that—"contraires à vos propres lois, les domiciles des français ont été violés, . . . des spoliations de propriétés ont été violemment et injustement prononcées, . . . plusieurs de nos compatriotes ont été frappés par les

<sup>1</sup> Cf. Finlay's claim on Greece, *infra*, p. 117.

<sup>2</sup> 31 S.P. 1029.

<sup>3</sup> *Ib.* 938.

agents de la police ; . . . d'autres ont été jetés en prison . . . et mis au bloc comme de vils scélérats, sans avoir pu se faire entendre, *etc.*" (*sic*). It is curious that other nations had no complaints of such flagrant breaches of treaty ! Thouars demanded 10,000 piastres, or the delivery up of the local forts. Exactly as the Hawaiian king had done, the Tahitian queen resigned her external sovereignty. The real motives of the French can be accurately estimated from the " *exposé des motifs* " published in the *Moniteur* of 25 April 1843.<sup>1</sup> Lord Aberdeen officially characterized the cession as made—" partly by intrigue and partly by intimidation." <sup>2</sup> However, Louis Philippe's career was drawing to a close. We shall not, until we deal with events a quarter of a century later, have to examine aggressive acts of this character on the part of France : it need only be remarked that, on the occasion of an insurrection in 1844, the British Consul was ejected from the Islands, under aggravating circumstances of insult. On account of these latter, Guizot promised a full indemnity.<sup>3</sup> The incident very nearly provoked war. The London populace was counting up the alliances and resources of the two countries : the Cabinet were on the point of sending the Consul back to Tahiti on a man-of-war. But France firmly maintained the right of a government to expel persons whom it considered undesirable. <sup>4</sup>

For many years the Neapolitan Government steadily refused leave to build a Protestant church for the English community of Naples, and their right to do so was never questioned by the British ministers.<sup>4</sup> Turkey equally refused to allow the erection of a Protestant church in Jerusalem until 1845 ;<sup>5</sup> and then it was conceded on

<sup>1</sup> 31 S.P. 949.

<sup>2</sup> *Ib.* 953, Addington to Barrow, 11 July 1843.

<sup>3</sup> 32 S.P. 122, 1060.

<sup>4</sup> See 31 S.P. 1167, 1198 *et passim* ; 33 S.P. 1163, 1164, *etc.*

<sup>5</sup> 34 S.P. 1145.

the demand of Prussia and Britain. It was represented as demanded by the most-favoured-nation clause—which may be more than dubious. In a despatch of 1844 Lord Aberdeen asserted a right to protect Christians in Turkey.<sup>1</sup> But Turkey can never be taken as a precedent for anything. Mr. Wellesley, writing in 1846, says—“They demand our sympathy, but they are not under our protection.” The Armenian Protestants were organized as a recognized religious community in 1847.

It may surprise some to learn that in Tunis, in 1844, the jurisdiction of the Bey in person expressly extended over Europeans. A Maltese having killed a Turk (in British consular employ) in Tunis, the British Government remitted the case to the Bey. The consuls of the other nations warmly protested<sup>2</sup> against this procedure as reviving an obsolete practice. One curious feature of the trial was the rejection of a witness on religious grounds. That was expressly declared by Lord Aberdeen to be admissible: and indeed English law contained not dissimilar provisions. “It certainly would have been more satisfactory to H.M. Government if the witness in question had not been rejected on that ground. But as they have no reason to doubt that such is the Mohammedan law, or to suppose that the Bey of Tunis has been actuated in this matter by any other than a sense of duty, and a desire impartially to administer justice, H.M. Government, however they may regret the harshness of that law, do not consider that they would be justified in interfering with the sentence.”<sup>3</sup>

In the same year, Britain and other powers united

<sup>1</sup> 34 S.P. 1175, Aberdeen to Rose, 19 Sept. 1844. “H.M. Government perfectly approve of you affording general and efficient protection to all Christians in Turkey who may appeal to you against the oppression of the Mussulman authorities of the Porte.” See also 35 S.P. 935, 971; 40 S.P. 221; 45 *ib.* 1178.

<sup>2</sup> Except the American, John Howard Payne.

<sup>3</sup> 32 S.P. 807.



(ignoring their own history) in obliging the Sultan to refrain from visiting relapse into Christianity with a capital penalty, even in the case of his own subjects.<sup>1</sup> Turkey viewed this as an inadmissible interference, but eventually gave way.

The brigantine *Hibernia*, which had been engaged on her own account in diving operations on the coast of Peru in 1845 contrary to law, was arrested at Lambayeque, and after nine months' process, released. Falk, the owner, claimed £3,000.<sup>2</sup> The British Chargé d'Affaires, however, placed his conduct in so unfavourable a light, that the claim could not be for a moment entertained. Meanwhile, the naval forces on the station had been active, and a suspicion suggests itself that the acquittal of the vessel was not unconnected with that fact. Evidently the British Agent thought the ship was lucky to get off. The court proceeded on highly technical grounds.<sup>3</sup> The supercargo actually wrote to Commander Baillie, to keep his sloop at Lambayeque, evidently to overawe the courts.<sup>4</sup> This case shows the danger of making claims from a distance of thousands of miles. If Mr. Adams, the Chargé d'Affaires, had been a less competent or a less energetic person, it is quite possible that the affair would have ended differently.

The forms of law might have produced some unnecessary delay, says Aberdeen; "but neither in form nor in substance has there been sufficient cause for a remonstrance to the Peruvian Government."<sup>5</sup>

It appears that great anxiety was felt at the time at Lambayeque, on account of foreign designs on the neighbouring guano islands,<sup>6</sup> the Peruvian title to which was disputed.

During an insurrectionary outbreak at Madrid in 1848, a Mr. Whitwell of Darlington was killed and two

<sup>1</sup> 32 S.P. 922.

<sup>2</sup> 35 S.P. 1284.

<sup>3</sup> *Ib.* 1297.

<sup>4</sup> *Ib.* 1295.

<sup>5</sup> *Ib.* 1301.

<sup>6</sup> See 45 S.P. 1188, Hamond to Malmesbury, 20 April 1852.

English servants were deliberately wounded by the soldiery, when retiring from their challenge at night.<sup>1</sup>

At Naples, in 1848, a Mr. Maclean's carriage was attacked, and a Mr. Hemans struck, by soldiers. It does not appear that any satisfaction was obtained, any more than in the Madrid cases.<sup>2</sup>

A seaman belonging to H.M.S. *Rifleman* was shot in the execution of slave-trade duty at Moela (Brazil) in 1850. His alleged assailant was acquitted, and although Palmerston thought the proceedings "very unsatisfactory," he did not see any utility in further discussing the subject.<sup>3</sup> The trial was held without the witnesses from the *Rifleman* being given an opportunity of attending or of adding to their imperfect written evidence on which a condemnation had proceeded in the court of first instance.

A serious difficulty, leading to a suspension of diplomatic relations, occurred with Brazil in 1862. It was two-headed: the barque *Prince of Wales* ran ashore and was plundered in June 1861, while a party of officers from the *Forte* were arrested and imprisoned a year later. The former case of wreck took place on a remote part of the coast; still there were local authorities there who might have exerted themselves more efficiently. A government does not, however, undertake to insure against crime. In the way of subsequent prosecution, there were undoubted difficulties. But the measures taken were feeble in the extreme. Lord Russell wrote that a more searching investigation ought to proceed.<sup>4</sup>

"No government," said Mr. Taques, "can be answerable for damages caused by outrages committed, without its concurrence or instigation, in its territory, or by its subjects against foreigners. The duties and efforts of a just and conscientious government cannot go further than the employment of all means within its reach to

<sup>1</sup> Cf. the Honduras case, *infra*, p. 237.

<sup>2</sup> 41 S.P. 327.

<sup>3</sup> 44 S.P. 805.

<sup>4</sup> 54 S.P. 614.

ensure the conviction and punishment of those proved to be criminals."<sup>1</sup>

The proceedings of his government had not been marked by zeal; but in June 1862, a really searching investigation was commenced.<sup>2</sup> Two of the local officials were removed<sup>3</sup> and eleven more persons accused. Still, the British Envoy (Christie) was not satisfied, and the Marquis d'Abrantes may almost be excused for observing: "From Mr. Christie's language, the inference is that Mr. Vereker's 'information is alone to be trusted, whereas that gentleman's infallibility respecting the discovery of crimes, such as those in question, may without injustice, as Mr. Christie knows, be contested.'"<sup>4</sup>

Reprisals being resorted to in support of Mr. Vereker's views, the Brazilians agreed to terms. Repudiating all responsibility, they declined to arbitrate the amount, and paid £3,200 under protest.<sup>5</sup>

The other case, that of the insulted officers, they agreed to refer to the arbitration of Belgium, and here their evidence met with more credit. Belgium entirely exonerated the Brazilian Government and its officials from any blame whatever. The officers, according to their own account, were in plain clothes at Tijuca on 17 June: they were accosted by a sentry and violently taken into custody, marched to Rio after a night in prison, and put into a dirty cell there. There they spent another night, being released on the 19th. The sentry represented them as drunken aggressors. Robert Bennett, the proprietor of the hotel where they had dined, says that they left it "singing merrily": they had had two bottles of Burgundy and one of cognac. The

<sup>1</sup> 54 S.P. 617, Taques to Christie, 19 April 1882.

<sup>2</sup> *Ib.* 631.    <sup>3</sup> *Ib.* 670.    <sup>4</sup> The Consul.    <sup>5</sup> 54 S.P. 727.

<sup>6</sup> See the terms of protest, 54 S.P. p. 819, Moreira to Russell, 26 Feb. and (p. 822) 2 March 1863. Earl Russell returned a reply laying special stress on the refusal of the local authority to hold an immediate inquest.

Austrian interpreter corroborated him. King Leopold found<sup>1</sup> that—"There is no proof that the struggle arose out of the conduct of the Brazilian police, who could have had no reasonable motive for interference. The officers, when arrested, were not in the uniform of their rank, . . . and could expect no different treatment from any one else in similar circumstances. . . . The official who released them ordered their enlargement at the earliest possible moment, and in behaving thus was actuated by the desire to spare those officers the unfortunate consequences which might necessarily have followed according to law if the matter had been proceeded with."

Finding further that the imputation of drunkenness made by the Prefect in an official report, was made merely in the course of his duty to lay his view of the occurrence before the authorities, the arbitrator held that "*dans la manière dont les lois brésiliennes ont été appliquées aux officiers anglais, il n'y a eu ni préméditation d'offense, ni offense, envers la marine britannique.*"

Admiral Warren's heroics about "most atrocious outrage," and "brutal assault," and the demands of Lord Russell for the dismissal of the police ensign, and penalties on the sentry and censure on the Rio police, were thus discredited. Probably the affair originated in the sentry mistaking a little hilarity for intoxication.

In point of fact, disagreements about the slave trade lay in the background of the whole transaction.<sup>2</sup>

Although we have elsewhere mentioned the complaints against Greece which were made in and about 1850, it is well to state shortly with some accuracy what they were.<sup>3</sup> They are so often loosely referred to as "certain outrages," that particularity is desirable. They come under five heads.

<sup>1</sup> 53 S.P. 150.

<sup>2</sup> See Lord Russell's despatch of 6 June 1863 to Mr. Eliot.

<sup>3</sup> 39 S.P. *passim*.

1. A boat from H.M.S. *Fantôme* landed at an unaccustomed place, in 1848, at Patras, and two of the crew were alleged to have been communicating with bad characters, and to have fled on a summons from the Greek patrol. They were then arrested, and marched back to their boat. What possible motive the patrol could have had for a wanton arrest, it is not easy to see. No injury of the slightest kind was sustained by the sailors. It seems to have been a case of over-caution on the part of the Greeks, and of over-sensitiveness on the part of the British. With a little good-feeling, the absurdly trivial occurrence could have been adjusted.

2. Ionians complained of judicial torture at Patras and Pyrgos in 1846. One of them (Stellio Sumachi), accused of stealing a watch, said that stones were laid on his chest, while policemen jumped on them, and that he was beaten cruelly. A medical report showed that no marks were visible ; but Sir E. Lyons naïvely observed that stones would leave no marks—ignoring entirely the alleged bastinado "*à la Turque*." But the notorious fact that torture was employed by some Greek policemen, and that the Nomarch of the district had just resigned, as a protest, was a stronger ground for regarding the medical report with suspicion. The Greek Government seems here to have been clearly in the wrong in refusing to make reparation : they declined to produce the originals of various reports. Palmerston was quite justified in asking for a public inquiry. It was attempted to set up the decree of a secret and inferior tribunal, absolving the police, as conclusive. But this is one of the cases where the judicial investigation was clearly of an unsatisfactory kind ; obviously no security existed that the prosecution was adequately pressed. Two other Ionians were, in June 1847, imprisoned on a charge of displaying flags, contrary to bye-laws. And two were beaten at Pyrgos. The former was a perfectly trivial case, and could give rise to no reasonable complaint. The Pyrgos case the Greeks flatly

denied; but much evidence to the contrary was produced. Palmerston asked for £20 apiece for all four Ionians.

3. Six Ionian boats were plundered by robbers at Salcina in 1847. The thieves seized the custom-house, pillaged the boats and beat two of the masters. This Greece could certainly not be responsible for, even though it was represented as one of a series of piratical acts. All that she could fairly be required to do, was to take steps—not necessarily measures of celerity and vigour—to introduce a better and more settled state of things.

4. Mr. Pacifico's house was mobbed, and his furniture destroyed, at Athens in May 1847. The same considerations apply to this case; with the further remark, that some of the persons concerned in the outrage were known, and he could have sued them in the courts. Phillimore<sup>1</sup> is of opinion that Pacifico's claim was "not of that overwhelming character which alone could warrant an exception from the well-known and valuable rule of international law upon questions of this description."

5. Mr. Finlay's garden was encroached upon by King Otho in 1836. Is it possible that the grant of a Greek order to another Englishman, when "for literary eminence there are English names connected with the literature of the country known to all Europe"—on which occurrence Mr. Finlay descants at much length<sup>2</sup>—may have had something to do with his bringing forward this complaint at six years' distance? The ground annexed was, according to himself, "of trifling extent." He would not accept the legal valuation by two Greek commissioners. Expropriation is a well-known thing, and is nowhere regarded as a damage to property, requiring an independent estimate. It may be a question whether it ought not to be so. Mr. Finlay's argument was that the encroachment was always represented as, not expropriation, but a despotic personal act of the King, and on that account he forbore to press his claims until 1842.

<sup>1</sup> *International Law*, II. 41.

<sup>2</sup> 39 S.P. 413, 415.

In the end, after reprisals had been in progress some time, Mr. Finlay received £1,066 17s., Pacifico £500 for personal injuries, the Salcina boats £200, the Ionians £20, and Pacifico the balance of a sum of £6,403 10s., plus an uncertain amount which proved to be quite insignificant (£150, instead of £21,295 demanded). An apology was made for the conduct of the Patras authorities in arresting the boat's crew.

Again, on the occasion of the attempt by Mazzinists to descend upon Calabria in 1857, by seizing at sea a Sardinian Rubattino steamer, the *Cagliari* (the Genoa-Tunis packet), the Sicilian Government intercepted the vessel (after she had landed the insurgents) and threw the crew into prison—among them two British engineers. Clarendon wrote<sup>1</sup>—"As these persons are said to have been actually employed on board the steamer *Cagliari*, when that vessel was engaged in landing a revolutionary party on the Neapolitan coast, H.M. Government do not claim to withdraw them from the fair operation of the Neapolitan law; *but at the same time* H.M. Government are entitled to demand that they shall have a fair and public trial, with proper legal assistance to prepare their defence, their legal adviser being chosen, not by the government which accuses them, but by the Consular Agent of their own government; and unless there be any positive and publicly known regulation which precludes prisoners confined before trial on such a charge as that brought against these men (of which charge the British Consular Agent ought to have a copy), from communicating with their consul, then and in such case H.M. Government have a right to insist upon the British Consular Agent having free access to the prisoners for the purpose of supplying their wants and providing for their defence on their trial, which ought not to be unnecessarily delayed."

It is submitted that in this note again, secure in the

<sup>1</sup> 48 S.P. 345, Clarendon to Barbar, 8 Oct. 1857.

moral and material weakness of the Sicilian King, Lord Clarendon overstepped the boundaries of accuracy.

He requires :—

- (1) Publicity.
- (2) Counsel.
- (3) Independent advocacy and advice.
- (4) Consular access.

It is submitted that International Law confers on a nation no right to dictate the methods of its criminal procedure to another. Nor is it easy to understand why the claim of consular access is made subject to there being no well-known provision of the local law to the contrary. There seems some confusion here between the substantive and the adjective criminal law. A foreigner may well complain of being penalized for breaking an unknown law. He cannot decently complain of being tried in a legal but unusual way. In point of fact, the seclusion of the untried prisoner was both legal and usual in Naples. Publicity and the free choice of an advocate were in accordance with the Neapolitan law. On the reply of Comm. Carafa, establishing these facts, Lord Clarendon, somewhat nonplussed, consulted Sir J. D. Harding, Q.A. That authority<sup>1</sup> could not say that the Neapolitan law was otherwise than as stated, and remarked that in strict law there was no legal right of access of the kind contended for, in England. Lord Clarendon's next note<sup>2</sup> was couched in much milder terms, and only objected to the indefinite detention of the prisoners and demanded that Park might be visited by a relation, in accordance with the law of Naples. Three days later<sup>3</sup> he wrote personally to Comm. Carafa, making the additional request for access by the Acting Consul, but apparently as a matter of favour. Such access had then been conceded. Meanwhile, the Law

<sup>1</sup> 48 S.P. 351.

<sup>2</sup> *Ib.* 353, 11 Nov. 1857. And see a further opinion, *ib.* 368, 9 Dec. 1857.

<sup>3</sup> *Ib.* 359.



Officers of the Crown had given an opinion respecting the jurisdiction of the Neapolitan sovereignty to try these persons at all.<sup>1</sup> Sir J. D. Harding, Q.A., and Sir H. S. Keating, S.G., thought it had jurisdiction in any event; Sir R. Bethell, A.G., thought that it had, if the capture was effected in Neapolitan waters or by voluntary surrender. The opinion drafted by the Attorney-General is of great precision and clearness, and it ends by saying with regard to the trial—"The Government may justly protest against any unnecessary cruelty in the treatment of the prisoners, and has a right to interfere to see that their trial is fair and just."

Such generalities do not carry us very far. The matter of jurisdiction was pursued at length, and a further opinion of the Queen's Advocate and the Solicitor-General<sup>2</sup> deals with the points newly raised by the Foreign Office. Were the British engineers bound by the Sardinian captain's surrender? Could it be called a voluntary surrender at all? And if not, were the Neapolitans justified in capturing a Sardinian ship on the high seas? These were flimsy questions, and one wonders who invented them. The Law Officers had no difficulty in deciding (1) that the men were bound by the acts of the captain; (2) that the ship did not purge her piratical offence<sup>3</sup> by landing the insurgents, but remained subject to be dealt with by the Neapolitan forces on the high seas; (3) that, in any case, the Sardinian Government was alone entitled to protest.

The Sardinian Government did protest, on the ground that the piracy could be separated from the ship, and that after the insurgents had left her the Neapolitan Crown had no more jurisdiction. They claimed the release of the prisoners and the rendition of the vessel, which had been condemned as a prize.

<sup>1</sup> 48 S.P. 375, 21 Dec. 1857.

<sup>2</sup> *Ib.* 378, 1 Jan. 1858.

<sup>3</sup> See on this point *ib.* 388, Hudson to Clarendon, 17 Jan. 1858; *ib.* 393, Cavour to Gropello, 16 Jan. 1858.

The British Law Officers<sup>1</sup> declined to concur in the Sardinian view. Their opinion (in which Sir R. Bethell participated, and which is marked by vigour and lucidity) declared that the Prize judgment could not be controverted, in the absence of conclusive evidence of impropriety. Carafa had no difficulty in replying to Sardinia by a reference to the case of the *Carlo Alberto*. "All hostility caused by a vessel, though she be protected by the flag of a friendly power, confers a right to capture the said vessel, to whatever place she may be pursued."<sup>2</sup> Cavour retorted that the *Carlo Alberto* was captured in territorial waters.<sup>3</sup>

Watt and Park were on arrest subjected to considerable indignities (undressing, jeering, ironing),<sup>4</sup> and were for a time (three months) subjected to most unhealthy incarceration. They were refused from 27 June (when captured) to 24 Nov.—five months—leave to see the consular officer. Watt's reason gave way under his apprehensions, and he was then (March 1858) released and permitted to leave the country; whilst Park was ultimately also discharged. The Neapolitan Government was induced to pay £3,000 compensation: which does not seem excessive if the principle was admitted. The prolonged detention of the men before the public trial was not without parallels in England. In point of fact, the real trial, in accordance with Continental procedure, was proceeding all the while. The insanitary state of the jail was a more serious point; but the engineers were better treated than ordinary Neapolitans, and it is difficult to say that there was any flagrant cruelty in not providing special accommodation for them. The real *gravamen* of the complaint was that there was prac-

<sup>1</sup> 48 S.P. 392, 5 Feb. 1858. See a further opinion of the Queen's Advocate (11 Feb. 1858), *ib.* 400.

<sup>2</sup> *See*, "not within friendly territory"—see *ib.* 413.

<sup>3</sup> *Ib.* 427, Cavour to Gropello, 18 March 1858.

<sup>4</sup> Details at S.P., *loc. cit.* 452.

tically no evidence against the men. It was only the exaggerated apprehensions of the Neapolitan Government that insisted on treating as dangerous criminals the foreigners who happened casually to be employed on a ship which was made the instrument of a piratical adventure. The two elements combined—the flimsiness of the charge, and the rigorous character of the detention—must be considered as having constituted the ground on which compensation was claimed and paid. Innocent persons had, without any sensible reason, been subjected to the severe treatment which the Neapolitan administration, rightly or wrongly, applied to suspected criminals.

The stupidity of the Neapolitan *régime* is more conspicuous than anything else. The immediate and handsome release of the engineers could not have harmed the kingdom, and it would have had the best moral effect.

The Law Officers<sup>1</sup> had advised<sup>2</sup> that compensation could be claimed :—" We are of opinion that there is no ground whatever which justifies the Neapolitan Government in having subjected Park and Watt to this prosecution or in having inflicted upon them, as malefactors of the worst class, a long and inhuman imprisonment." So far as the point of jurisdiction was concerned, Sir J. Harding again found a Solicitor-General to concur with him in differing from the Attorney-General. Their opinion<sup>3</sup> gives the best connected history of the transactions, from which it is to be gathered that some of the *Cagliari's* crew landed and were wounded with the insurgents. The only alternative, they point out, to the ship's seizure—her immediate dismissal on the high seas—might have allowed the real criminals to escape and commit fresh piracies. If the Sardinian doctrine were to be supported, pirates need only obtain possession of a duly documented vessel, in order to secure perfect immunity.

<sup>1</sup> Harding, Kelly and Cairns.   <sup>2</sup> 48 S.P. 463, 12 April 1858.

<sup>3</sup> *Ib.* 465. See Sir Fitzroy Kelly's at p. 484 *loc. cit.*

Carafa<sup>1</sup> appears to have admitted the right of the foreigners to a "speedy, regular and public" trial.

In 1849, British subjects settled in Tuscany asked on the ground of war-damage for indemnities from that Duchy and from Austria. Tuscany was willing to refer the affair to Russian arbitration; but Russia was of opinion that there was nothing to found an arbitration upon, and declined to entertain the matter.<sup>2</sup> Prince Schwarzenberg had declared<sup>3</sup> his surprise that any state should ask for its citizens more advantages and greater privileges than the inhabitants of the country themselves. A foreigner who goes to a country where civil war breaks out must take the consequences. Count Nesselrode entirely concurred. "S'il n'en était pas ainsi, la présence des sujets anglais au milieu des autres nations, deviendrait un véritable fléau, et servirait d'instrument aux révolutionnaires de tous les pays pour créer des embarras au gouvernement de chacun d'eux." And of course the same reasoning applies to reactionaries.

During the temporary alienation of Naples from Austria, in May 1848, a Neapolitan squadron was detached to attack Trieste, and it was joined by the Sardinian. The interposition of the British authorities was urgently invited, owing to the danger to British property in that town. The commander of H.M.S. *Terrible* told the Austrians that all he would be justified in doing was to give his compatriots a refuge on board his steamer.<sup>4</sup> The Ambassador in Vienna,<sup>5</sup> however, directed the Vice-Consul at Trieste to inform the Neapolitans and Sardinians that an indemnity would be exacted if British property happened to be destroyed, and the consular body at the port addressed a joint protest against bombardment.<sup>6</sup> Palmerston<sup>7</sup> contented himself with expressing a hope that no bombardment would take place, merely hinting

<sup>1</sup> *Loc. cit.* 497.

<sup>2</sup> Calvo, apud *Rev. de D.I.* (1869), 419.

<sup>3</sup> Despatch of 14 April 1850.

<sup>4</sup> 37 S.P. 1107.

<sup>5</sup> *Ib.* 1108.

<sup>6</sup> *Ib.* 1118, 1129.

<sup>7</sup> *Ib.* 1117.

at possible claims. The Secretary to the Admiralty<sup>1</sup> told Captain Ramsay to use his own discretion, but, generally, not to interfere, if sufficient time were given for the withdrawal of British [movable] property. And the French Consul demanded forty-eight hours' notice.<sup>2</sup> A general notice<sup>3</sup> was returned as insufficient. In fact, Trieste being not only Austrian, but included in the Germanic Confederation, no bombardment was attempted.<sup>4</sup>

On the occasion of the bombardment of Messina, in 1848, Lord Napier addressed protests to the Neapolitan Government, on the ground that due notice was not given to foreign residents.<sup>5</sup> It was replied that the damage to persons and property was accidental. The town had long been in a state of siege, and—"the inhabitants of Messina, native and foreign, must be prepared to take those precautions for their own safety which they may deem advisable."<sup>6</sup> It is said that Germany has continually claimed damages on account of losses sustained at Alexandria by German subjects. No complaint appears ever to have been advanced by any nation of losses at the bombardment of Copenhagen. No measures were taken to obtain damages for losses sustained during the Polish insurrection, the American Civil War, or the Franco-Prussian War.<sup>7</sup> For the Belgian events of 1830, see *supra*, p. 97; for the Chilian of 1881, *infra*, p. 177; for the Venezuelan of 1901, *infra*, p. 240.

Changing the scene to the West, we find North America

<sup>1</sup> 37 S.P. 1121, 1150.

<sup>2</sup> *Ib.* 1145.

<sup>3</sup> *Ib.* 1203.

<sup>4</sup> *Ib.* 1217. Logically, the blockade already imposed was no more, and no less, improper. And in fact, it was raised on this account, 12 July 1848 (41 S.P. 1195). See also 45 *ib.* 373.

<sup>5</sup> 40 S.P. 768, 786, 789.

<sup>6</sup> *Ib.* 792.

<sup>7</sup> France spontaneously accorded certain relief: Nys, *Rev. de D.I.* (1906), 450. And see 17 *Annuaire de l'Institut de D.I.*, 111; Morin, II. xiii. 14; and the Peruvian author C. Niesse, *Le Droit international appliqué aux guerres civiles* (Lausanne, 1898).

refraining from pressing any particular complaint on account of the arrest, at the time of the Fenian outbreak of 1848, of five Americans at Armagh. They were arrested under legal powers, indeed, but in pursuance of a law<sup>1</sup> which was most rarely put in force. Their detention lasted only a day or two. A general circular was said to have been directed to the Irish police (2 Aug.) requiring the arrest and search of "all persons coming from America": this was modified (18 Aug.) so as to apply only to returning emigrants and suspicious persons. Mr. Buchanan stigmatized these proceedings as relics of ancient barbarism; but he did not venture to assert that they were illegal, except as contrary to treaty.<sup>2</sup> United States citizens continued to be arrested. Messrs. Bergen and Ryan were detained three months, and access was refused to them, whilst Lord Palmerston temporized. They were then released, and Mr. Bancroft, the U.S. Minister in London, was instructed to protest against the singling out of U.S. subjects for the distinction of special treatment. It is not difficult to imagine what Palmerston might have said to Austria or Naples, had either country thrown British subjects into prison, without trial, for months, and had given them precedence in the hospitality of its prisons.

About the same time an unpleasant incident took place in Florence. An Austrian regiment was marching through the street, surrounded by an interested and not too friendly crowd. A young Englishman named Mather in some way obstructed the passage of the troops, and the Lieutenant in charge was led to fancy that he intended to strike him. As this would have been a mortal injury, to be expiated only by blood, he struck Mr. Mather a blow with the flat of his sword, which unfortunately injured him more than a little. Long correspondence

<sup>1</sup> 50 G. III. c. 102, § 7: empowering justices to take security from "suspects." Cf. also 11 & 12 V. c. 35.

<sup>2</sup> Buchanan to Bancroft, 7 Sept. 1848, 47 S.P. 1227.

ensued, in the course of which great discussion was expended upon the responsibility of the Tuscan Grand Duke for the acts of Austrian troops within his territories. The Austrian officer was not amenable to Tuscan law ; and it required great exertions to draw from the Duke of Casigliano the admission that this did not lessen the responsibilities of the Tuscan Crown.<sup>1</sup> Lord Malmesbury in reply expressed a hope " that the exceptional position in which the Tuscan Government is now placed by the apparently necessary presence of a foreign auxiliary army, will induce the Tuscan Government to be even more jealous than ever to assert its independence by a ready and attentive recognition of international law." The Tuscans offered Mr. Mather £222, as a matter of favour, but he indignantly refused it. They declined, fortified by the opinion of the veteran Prince Schwarzenberg, to regard the act of the Austrian officer as one for which any apology should be made, but they expressed their regret at Mr. Mather's hurt. Malmesbury had asserted that Mr. Mather, " a British subject cruelly injured on Tuscan territory," ought not to be indebted to the charity of the Grand Duke for " that protection and compensation which he had a right to claim from justice and international law." <sup>2</sup> Owing to the refusal of the proffered indemnity by Mr. Mather altogether, the delicate question of his right to anything was never fully settled. And this further question arises. If the rights of a foreigner are limited by the law of the land, and this law concedes to any person—native policeman or foreign soldier—the right to take certain violent methods of preserving order with impunity—can the foreigner complain ? It is, in another form, the exceedingly difficult question of setting a limit to the power of enacting harsh laws. Lord Malmesbury argued that to disclaim respon-

<sup>1</sup> 60 S.P. 1186, Casigliano to Bulwer, 16 June 1852.

<sup>2</sup> *Ib.* 1172, Malmesbury to Bulwer, 29 May 1852. See also Vol. 42, *passim*.

sibility for the acts of Austrian officers was to abnegate sovereignty. This appears to be a far-fetched view. The net result of the discussion was very small; the Tuscans indeed admitted that their duty to protect foreigners was not affected by the presence of the Austrian troops—but they never admitted that they had failed in that duty in the present instance.

We now shift the scene to Bolivia, where in 1853 there was a little breeze with Great Britain. Lord Clarendon<sup>1</sup> does not condescend upon details. He observes that an important contract with British subjects had been violated, and decrees issued prohibiting various branches of commerce in which British subjects had been engaged. In consequence, he withdrew the British Chargé d'Affaires. It can hardly be doubted that Bolivia was at liberty to frame her own commercial decrees, and the infraction of one private contract, however important, was not in itself a serious injury to Great Britain. The affair is indexed in the State Papers as "Outrages on British subjects in Bolivia." "Outrages on their purses" would have been more accurate.

A New Orleans crowd, in 1851, wounded Spaniards, destroyed houses, tore flags and assaulted the Consul. The U.S. Government disclaimed responsibility for the riot, but accepted it for the particular injury offered to the consulate.<sup>2</sup>

In 1858, the Portuguese Government captured a French vessel, the *Charles et Georges*, as a slaver. Condemned in Mozambique, the vessel appealed to Lisbon, when the French Government made a peremptory demand for its release. The Marquis de Loulé replied that the Portuguese constitution did not enable him to interfere with process of law.<sup>3</sup> The French diplomatists took the high ground that as the ship had a government recruiting

<sup>1</sup> 56 S.P. 1003, Clarendon to Lloyd, 26 Aug. 1853.

<sup>2</sup> Calvo, apud *Rev. de D.I.* (1869), 421.

<sup>3</sup> 49 S.P. 621, Howard to Malmesbury, 18 Sept. 1858.



agent on board, she could not possibly be proved a slaver,<sup>1</sup> and that her condemnation as such was an insult which could not be the subject of arbitration or mediation.<sup>2</sup> Eventually the ship was given up.

A rather amusing case occurred in the year 1860 in Prussia, on the Rhine,<sup>3</sup> arising out of a tourist's insistence on reserving his friends' seats in a railway train. He was somewhat roughly hustled by the station officials, and arrested. He was lodged in jail and allowed visits for half an hour a day, but he was detained for six days without warrant, contrary to the provisions of Prussian law. At the expiration of that time he was fined. Eleven British residents were next prosecuted for seditious libel, in publishing a protest against some strong remarks reflecting on the conduct of British tourists abroad, made by the public prosecution in the conduct of the case.

Lord Bloomfield<sup>4</sup> then demanded that the counter-proceedings against the public prosecutor for aspersing the foreign community, should include the examination of witnesses on oath and in public. Lord Russell<sup>5</sup> found it "difficult to do more than require that the Prussian law should be fairly and impartially administered."

Baron Schleinitz<sup>6</sup> took occasion to say that Captain Macdonald was from the first accommodated with a separate and clean room, and this appears to have been the fact. The proceedings against the public prosecutor ended in his being made the recipient of an official reprimand, and the Minister of Justice intimated the desirability of the proceedings against those who had publicly protested against his aspersions being dropped accord-

<sup>1</sup> 49 S.P. 627.

<sup>2</sup> *Ib.* 641, Cowley to Malmesbury, 3 Oct. 1858; 644, 8 Oct.; 649, 10 Oct.

<sup>3</sup> 52 S.P. 64.

<sup>4</sup> *Ib.* 75, Bloomfield to Schleinitz, 2 Oct. 1860.

<sup>5</sup> *Ib.* 80, Russell to Anderson, 5 Oct. 1860.

<sup>6</sup> *Ib.* 90, Schleinitz to Bloomfield, 29 Oct. 1860.

ingly. They nevertheless proceeded, and ended in the defendants being fined.<sup>1</sup> They were included in the general amnesty proclaimed at the King's coronation at Königsberg.

On the whole, Lord Russell considered the Prussian Government's conduct as "too clearly evincing a disregard of international goodwill."<sup>2</sup> Since he could not object to its legality, he attacked it on grounds of comity and pronounced it "in a high degree unfriendly." "Prussian law was enforced with extreme and unnecessary harshness, and in a manner not required for the purpose of justice. To throw a person of the rank and station of Captain Macdonald into prison on such a charge, and to refuse his liberation on bail, was an act which in England we should ascribe to a malignant spirit, violating the limits of a temperate administration of justice." This condemnation related only to the moral aspects of the case; legally, the conduct of the Prussian Government was admitted to have been justified. Count Gruner<sup>3</sup> expressed surprise, as well he might, at the severe tone of this despatch of Russell's. He incidentally observed that the executive had no power to interfere with the tribunals, and that in regard to the prosecution of the advertisers, it had simply "walten lassen." ("Captain Macdonald's behaviour," he added, "was not calculated to make him known as a person of high rank and distinction.")

"The course of justice in Prussia," he observes, "is as free from all interference of the Government, and as independent, as in England. It is not in the competence of the Government to impede it, and the decision was solely in the hands of the tribunal, not in those of the Government." The Prussian Government therefore firmly repudiated the suggestion that anything unfriendly had been done or contemplated.

<sup>1</sup> 49 S.P. 106.

<sup>2</sup> *Ib.* 116.

<sup>3</sup> 52 S.P. 119, Russell to Lowther, 11 Feb. 1861.

<sup>4</sup> *Ib.* 120, Gruner to Bernstorff, 27 Feb. 1861.

It was not only the outcast governments of Naples and Tuscany that were the scene of injury to foreigners in Italy. The favoured Sardinian Kingdom presented a case for inquiry. It is rather complicated. A British subject (Mr. W. Taylor) had bought the Tuscan island of Monte Christo for £2,000, and had laid out a good deal of money upon it. The military guard on the island had revolted to the Sardinians, and trivial quarrels with Mr. Taylor led to his being charged with sedition, and Mrs. Taylor with disrespect to "the sacred person of His Majesty King Victor Emmanuel." They hurriedly left the island, and eight days later it was pillaged by a piratical vessel manned by Garibaldians (mostly British subjects). The King very wisely and graciously remitted the penalties of twelve and twenty-one months' imprisonment imposed in default of appearance by the local court at Elba, and actually paid the costs. But Earl Russell<sup>1</sup> still pressed for an expression of regret and for an assurance of future security, together with compensation for the damage done by the pirates in Taylor's enforced absence.

The British Minister at Turin<sup>2</sup> observed that "as the judiciary in Tuscany was constrained to abide by the forms of the code, I do not see how the public prosecutor or the judges can be blamed for having followed its regulations and sentence; *nor do I see how the Executive Government can be blamed*, if the judiciary, over whom they have no control, followed the line of conduct prescribed by the code. . . . Had they interfered with the judiciary, they would have set aside the Constitution, and have committed an act for which they might have been impeached; they would have imitated those governments which had gone down and gone out for the very reason that they never did observe the fundamental pact between sovereign and subject." And

<sup>1</sup> 51 S.P. 765, Russell to Hudson, 30 Jan. 1861.

<sup>2</sup> *Ib.* 789, Hudson to Russell, 1 Nov. 1861.

Earl Russell at last agreed<sup>1</sup> that the British Government could not press the matter further, the criminal proceedings having been regular and terminating in a pardon; and the violent acts having been committed by persons who were never "in the pay, or under the control of, or in any way connected with, the Sardinian Government."

Their ship, the *Orwell* (which they had appropriated at Genoa), was subsequently captured by the *Scylla* at Messina, and it was proposed to put them on trial for piracy at Malta. The irregularity was committed of carrying out the capture through the formal agency of the insurgent authorities at Messina;<sup>2</sup> and why the Neapolitan authorities allowed the ship to leave Naples (whither she was taken in the first instance) is not apparent. The Crown Advocate and the Governor at Malta thought that there was no evidence of piracy or of any unlawful act within British jurisdiction, and that no notice should be taken of the affair. It is difficult to understand this opinion, but the Attorney-General concurred with it, and the proceedings were dropped. Admiral Codrington took a sounder view.

In October, 1861, we find Lord Lyons<sup>3</sup> complaining to Mr. W. H. Seward that two British subjects, called Patrick and Rahming, had been arbitrarily arrested. While observing that the Government would not have objected to the suspension (at such a time) of the ordinary guarantees of personal liberty, Lord Lyons thought that Congress should have been consulted. "This despotic and arbitrary power . . . of depriving British subjects of their liberty, of retaining them in prison, or liberating them by his own will and pleasure," exercised by the Federal Secretary, was stigmatized as contrary to treaty, hostile to intercourse, and against the Constitutio

<sup>1</sup> 51 S.P. 798; see 54 *ib.* 1327.

<sup>2</sup> 54 S.P. 1305.

<sup>3</sup> 51 S.P. 241, Lyons to Seward, 14 Oct. 1861.

the States. The Secretary of State<sup>1</sup> announced that Mr. Patrick's innocence had been proved, that he had been released, and that Mr. Rahming had been released on bond. He had no difficulty in repelling Lord Lyons' incursions into the realm of U.S. Constitutional Law. "This Government does not question the learning of the legal advisers of the British Crown, or the justice of the deference which H.M. Government pays to them. Nevertheless, the British Government will hardly expect that the President will accept their explanations of the Constitution of the United States, especially when the Constitution, thus expounded, would leave upon him the sole executive responsibility of suppressing the existing insurrection, while it would transfer to Congress the most material and indispensable power to be employed for that purpose." Lord Russell disclaimed the intention of pronouncing *ex cathedra* upon such a matter, but<sup>2</sup> he again insisted that (as we have so often seen) it is the law of the country which *primâ facie* measures the right of the foreigner to complain. So long as the violence to which he is subjected is legal and usual, he cannot have much ground of reclamation. If it is unlawful, he has been entrapped. Russell, somewhat unfortunately, distinguishes between the complaint of injustice and the complaint of ill-treatment. So long, he says, as the complaint is merely of violated right, it is necessary to examine the local law, in order to see if the right existed. But there can be little or no complaint when a government arbitrarily withdraws a trivial right. It is not bound to apply its law inflexibly. What it is bound to do, is not to treat foreigners with capricious cruelty. The reason for invoking the local law is, that legal action *cannot* be complained of as capricious. Lord Russell ended by repeating that the wanton, capricious arrest of Mr. Patrick could not be justified by the necessities of war.

<sup>1</sup> 51 S.P. 243, Seward to Lyons, same date.

<sup>2</sup> *Ib.* 252, Russell to Lyons, 22 Nov. 1861.

Washington not being Naples, he could get no farther ; and Mr. Seward <sup>1</sup> cheerfully appealed from his judgment to that of history, which, on the whole, has sustained the contention of the United States.

A Canadian called Shaver, arrested on suspicion and detained by executive authority, was released on taking an oath of neutrality, after about eight weeks.<sup>2</sup>

Great difficulties arose in connection with the question of forcible enlistment ; but as the law on this particular subject is well settled, it appears to be unnecessary to detail the discussion.<sup>3</sup>

A complicated, curious, and interesting case occurred in Mexico in and subsequent to 1860. During a civil war, a convoy of specie was, while on its way to the coast, taken possession of by General Degollado in the fashion which we have since learned to call " commandeering." It was money set aside for the service of interest on foreign debt, and the British representative succeeded in obtaining its refund, so far as the creditors were of that nationality.<sup>4</sup> Later in the year, a more serious incident took place. The British Minister having quitted Mexico, the legation was forced by the government and \$660,000, belonging to bondholders, were carried off. The money had been paid by the customs direct to the bondholders' agent (in accordance with law).<sup>5</sup>

The British Minister observed that an attempt had been made by the government in Mexico to claim a jurisdiction over the bondholders' money so long as it remained in the country undivided. Even so, he controverted the right to take it out of the consul's house by force, and concluded that " the foreign resident has no longer any security for life or property." <sup>6</sup> The question is complicated by the circumstance that the money

<sup>1</sup> 51 S.P. 264, Seward to Lyons, 13 Jan. 1862.

<sup>2</sup> 55 S.P. 706.

<sup>3</sup> *Ib.* 521.

<sup>4</sup> 51 S.P. 559.

<sup>5</sup> *Ib.* 575, Mathew to Glennie, 22 Nov. 1860.

<sup>6</sup> *Ib.* 576.

was protected by the legation seal, although the Legation had withdrawn. But the rights of a withdrawing ambassador can scarcely extend to spreading an odour of sanctity for an indefinite time round his deserted dwelling. And the argument that a government is entitled to borrow what it requires for the public service in an emergency, by force if necessary, is not very easy to answer. It can hardly be said that the government of General Miramon, in helping themselves to cash within their orbit of authority, had, in the energetic language of the ex-Minister, "trampled every law of civilization under foot." Nor that, in the solemn diction of Lord John Russell, "a more lawless outrage was never committed by persons assuming to be a regular government." Lord John Russell was obliged to content himself with language, for he could not reach Miramon, and the Mexicans whom he could reach were Miramon's enemies. "Nothing less than marching a British army to the capital of Mexico would reach General Miramon, and H.M. Government," he adds drily, "do not contemplate such a measure."<sup>1</sup>

He declared his intention of holding the successful party in Mexico ultimately responsible for the cash : and on these terms he now agreed to recognize and support Miramon's rival, Juarez. The committee of Mexican bondholders themselves<sup>2</sup> admitted that the mere non-payment of the interest would give no right of interference to the British Government. But here, they insisted, there was a "tangible" security, and they argued that the customs revenues on collection became "indelibly invested with the character of realized British property." When Juarez succeeded in breaking up the resistance of Miramon, the way was clear for an accommodation. The *de facto* government of the latter was treated as mere rebellion : the cash was paid to the bondholders within four months by Juarez as the price of his success : the

<sup>1</sup> 51 S.P. 577, Russell to Mathew, 12 Jan. 1861.

<sup>2</sup> *Ib.* 578, McGarel to Russell.

Mexican Government agreed to hoist their flags when the new Minister entered the violated consulate, at the same time maintaining that they did this merely to manifest their delight, and not because they recognized any responsibility for the rebels whom they had overcome.<sup>1</sup>

The matters outstanding nevertheless required some adjustment. The dethroned government had put a violent end to certain prisoners. For this, Lord Russell held their successors liable. No argument can be drawn from this contention in support of the doctrine that a government is liable for the acts of rebels. For, although the successful revolutionaries affected to treat the party of Miramon as such, it must be remembered that it was formerly the party in power at the capital, and the party which had relations with foreign states as the sole authority representing Mexico. In the case of a Dr. Duval (a medical man in the revolutionary service, who was shot in cold blood), the new government set aside \$25,000 as a free gift to his widow and family, which was accepted as satisfactory<sup>2</sup>; indeed, as Duval had taken service with the Mexican troops, it does not appear that either faction was liable to Great Britain.

A list of other cases is given by the "Mexican Extraordinary,"<sup>3</sup> which includes the following:—

1. Bodmer, shot on his balcony while endeavouring to save a Mexican from ill-treatment at the hands of troops.
2. Burnand, severely assaulted by revolutionary troops: factory sacked and burnt.
3. Newall, threatened with shooting in default of giving up cash held as agent.
4. Pitman, forced to pay to Miramon duties already paid to revolutionists.
5. Davis, imprisoned and impressed for refusal to pay a forced loan to Miramon.

<sup>1</sup> 51 S.P. 628, Zario to Mathew, 12 Feb. 1861.

<sup>2</sup> 52 S.P. 250.

<sup>3</sup> *Ib.* 272.



6. Whitehead and Potts, expelled for protesting against violence.
7. Jones, dismissed from post.
8. Selly, imprisoned on suspicion of treason.
9. Lynch, forced loan.
10. Perry, twenty-eight days' detention and expulsion on suspicion of treason.
11. Worrall, expulsion for protesting against forced loan.
12. Lambley, plunder by revolutionary troops.
13. Gillow, requisitioning of waggons and stock.
14. Innes, plunder by faction of Miramon.
15. Owen, plunder by faction of Miramon.
16. Sumner, plunder by faction of revolution.
17. Fuller, requisitions.
18. Hooper, plunder by revolutionaries.
19. Turnbull, plunder by revolutionaries.
20. Exaction of extra duties.
21. Destruction of goods by fire during bombardment of Matamoros (Oct. 1851).

The French drew up a long list of similar occurrences, distinguished principally by being attributed to private brigandage.<sup>1</sup>

Most of these claims were absurd. They were an attempt to make Mexico responsible for civil war. Strangers must take the risk of such events.<sup>2</sup> A really atrocious outrage was the assassination of a Mr. Beale on 7 July 1861, at his house near Mexico, simply on the ground of his being a foreigner. The act was probably committed by marauding bands of the dispossessed government. It is certainly impossible to hold the new government, which was hardly able to secure its own life, responsible for it.

<sup>1</sup> 52 S.P. 344.

<sup>2</sup> Compare with them the attack on a British subject, Finkenstein, by Russian troops into whose hands he fell during the Polish insurrection of 1862, 53 *ib.* 842; *Fremdenblatt*, 19 March 1863.

On 28 June 1861, in the course of a skirmish outside Mexico City, 160 English miners were assaulted and robbed,<sup>1</sup> at Real del Monte ; and Lord Russell considered the Mexican Government responsible for this act of their enemies, as well as for the assassination of Mr. Beale.<sup>2</sup>

Other outrages followed, such as the killing of a French and a British subject by robbers. How could a government, fighting for its life, be expected to prevent, or be responsible for, such occurrences ?

The British Minister continued to press for a settlement. The Mexican Government declined it on the ground of poverty and suspended payment. Yet \$6,000,000 had passed through their hands, and they had annexed the ecclesiastical property.

Not only did the government suspend the service of the Debt, but in their desperation they resorted to a regular system of benevolences, and began by imposing an extra tax of 1 per cent. on all *capital* exceeding \$2,000. The Corps Diplomatique recommended resistance (except the U.S. Minister).

The British Legation was then again withdrawn, in concert with those of Spain and France.

It almost seems as if Russell would now have intervened in Mexico, but for the difficulties of the situation. Should a more capable government be established, he observes, H.M. Government would cordially rejoice ; " but they think this effect is more likely to follow a conduct studiously observant of the respect due to an independent nation, than to be the result of an attempt to improve by foreign force the domestic institutions of Mexico."<sup>3</sup> Besides, " without at all yielding to the extravagant pretensions implied by what is called the Monroe doctrine, it would be as a matter of expediency unwise to provoke the ill-feeling of North America, unless some paramount

<sup>1</sup> 52 S.P. 319.

<sup>2</sup> *Ib.* 321, Russell to Wyke, 10 Sept. 1862.

<sup>3</sup> *Ib.* 367, Russell to Cowley, 30 Sept. 1861.

object were in prospect and tolerably sure of attainment." Mr. Thouvenel thought, on the contrary, that there was a large body of neutral moderation in Mexico, which only needed to be encouraged by the presence of a foreign force. The result was ultimately the Triple Convention<sup>1</sup> between Britain, Spain, and France, which resulted in warlike operations, Spanish and French troops and British marines occupying the forts and town at Vera Cruz on 17 Dec. 1861. The three powers disclaimed any intention of supporting any particular ruler in Mexico ; but obviously the effect of their violence was to support the sanguinary bands of Miramon's party who were really the authors of the injuries complained of. Further intervention followed, leading up to the French fiasco of a Mexican Empire. The policy of leaving Mexico severely alone was then tried. In a few short years the flames of conflict and anarchy burnt themselves out, and a strong and stable government was formed, able to do justice to all parties. There could be no better demonstration of the benefits of strictly abstaining from making the inevitable evils of civil war a ground of complaint and interference.

It is worth noting, as a separate and independent matter, that Spain (which was prepared to act by herself against Mexico) expressed her readiness to recognize the title of foreign bondholders to a fixed share of Mexican customs revenues.<sup>2</sup> This is exceedingly important, because a third power is in no way bound by the personal engagements of a state with which it goes to war. The Spanish attitude amounts to a recognition of something like a real right residing in foreign nations to these hypothecations of customs duties. It is very doubtful whether anything of the kind exists. The rights of occupation and conquest cannot be fettered by an easy invocation of third parties.

<sup>1</sup> 52 S.P. 394, Seward to Tassara, 4 Dec. 1861.

<sup>2</sup> *Ib.* 372, Crampton to Russell, 24 Sept. 1861.

In 1861 a sea-captain, Wite (White?) by name, was arrested at Callao on suspicion of having been concerned in the assassination of President Castilla. He was released and expelled on 9 Jan. 1862. Great Britain asked for £4,500 for him: the dispute was referred to the Senate of Hamburg, but it absolved the Peruvian Government<sup>1</sup> (12 April 1864), the proceedings having been regular and in accordance with Peruvian law.

A difficulty, or series of difficulties, between Britain and Paraguay was successfully accommodated by mutual apologies on the part of Great Britain and Paraguay in 1862.<sup>2</sup> A British subject (Canstatt) had been imprisoned. The British consul was alleged to have been insulted. British naval forces had fired on a Paraguayan war-steamer off Buenos Ayres (29 Nov. 1859). The vessel in question (the *Tacuari*) had collided with, and sunk, the *Little Polly*. The principal matter was the attack on the *Tacuari*. The British Government put it on record that they "regret very sincerely that the hostile attitude adopted by the naval forces in the River Plate against the Paraguayan steamer-of-war should have offended the dignity of the Republic of Paraguay, and declare in the most solemn manner that it never was, nor will in future be, their intention to offend in any way the honour of the Republic of Paraguay, or the dignity of its government."

Regarding the other questions, in the Canstatt case the Government of H.B.M. "never pretended to claim the right to interfere in the jurisdiction of Paraguay, and it never was nor will be their intention to prevent the Paraguayan Government from executing their laws." On the other side, "the Government of Paraguay, as they have stated before, had no intention to offend the said agent, and still less the Government of H.B.M." And without admitting liability for the collision, they com-

<sup>1</sup> Merignhac, *L'Arbitrage international*, § 47.

<sup>2</sup> Hertslet, *Treaties*, XI. 877.

promised the proceedings in that case by the payment of a voluntary indemnity.

During the violent scenes that accompanied the revolt which deprived Otho of the thorny throne of Greece (22 Oct. 1862), six marines were landed to protect the British Legation; a similar measure was taken by the French.<sup>1</sup> Nevertheless, an English watchmaker, Hall, had his shop pillaged<sup>2</sup> of £300 or £400 worth of watches, etc. Germans fared worse.<sup>3</sup> Mr. Diamantopoulos immediately expressed the willingness of the new government to compensate.<sup>4</sup> The British Minister remarked (29 Oct.) on "the inconvenient manner" in which the Athenians testify their joy on these occasions by firing ball (some of which struck his house): but did not complain of it. He added that he had not thought fit to dispense with the British guard: the more so as the Prussian Minister, who had accepted a Greek guard, had found them exploring his cupboards. Little cause for anxiety was, however, given to foreigners after the lapse of a day or two. But the soldiery became demoralized, and, early in May, a party of twenty or thirty made a disgraceful attack on two performers engaged at an Austro-French circus.<sup>5</sup> On 18 May 1863 two British officers were robbed by brigands—this band were duly captured within a fortnight.<sup>6</sup> Compensation to the extent of £2,321 was made to the circus people.<sup>7</sup> Greece was at the moment on her best official behaviour, King George's election being in progress. The payment of the circus claims, nevertheless, was made a popular cry against the ministry. There were faction fights in Athens, during which the consent of the President of the National

<sup>1</sup> 58 S.P. 1017, Scarlett to Russell, 24 Oct. 1862.

<sup>2</sup> *Ib.* 1020, Merlin to Scarlett, 25 Oct. 1862.

<sup>3</sup> *Ib.* 1033, Same to Same, 30 Oct. 1862.

<sup>4</sup> *Ib.* 1031, Scarlett to Russell, 29 Oct. 1862.

<sup>5</sup> *Ib.* 1132, Same to Same, 8 May 1863.

<sup>6</sup> *Ib.* 1138.

<sup>7</sup> *Ib.* 1143.

Assembly was obtained for the guarding of the Bank of Greece by foreign marines.<sup>1</sup> But Lord Russell expressed the unimpeachable sentiment that "the less foreign powers interfere in the internal affairs of Greece, the better will be the prospect of internal tranquillity and external peace for that kingdom." <sup>2</sup>

The Sardinian Government being established in Naples, an Englishman named Bishop was arrested on a charge of conveying treasonable correspondence between Naples and Rome. The charge was practically admitted; but Mr. Bishop complained of some ill-treatment (not very serious) when first arrested.<sup>3</sup> Lord Russell hoped he would not be killed, and he was in fact pardoned by the wise policy of the Sardinians.

During the progress of the Polish insurrection, a Reverend Mr. Anderson was thrown into prison at Grodno. After "some vigorous measures at the moment of his arrest" he was treated with courtesy,<sup>4</sup> and liberated in about three weeks at the instance of the British Ambassador. Mr. Anderson thought he would like compensation. Lord Napier, however, dissuaded him from pushing any claim. As a foreigner, he was not unnaturally an object of some suspicion. There was a *prima facie* case against him. He was soon set free, "and though subject[ed] to local detention longer than may seem consistent with necessity or justice, he was treated with civility. . . ." The inconvenience may be regarded as an accident not unnatural at a period of political revolution under a military government,—or, we might add, under a civil one,—witness the conduct of Britain in 1848 and of the U.S.A. in 1864. And Lord Russell agreed<sup>5</sup> that it was not a case in which compensation could be demanded.

In fact, the U.S. Government were at the moment

<sup>1</sup> 58 S.P. 1153, 1158.

<sup>2</sup> *Ib.* 1159, Russell to Erskine, 19 Sept. 1864.

<sup>3</sup> 60 S.P. 1224.

<sup>4</sup> *Ib.* 1013.

throwing blockade-runners into jail, on the pretext that they were in the service of the Confederate government, and therefore enemies.<sup>1</sup> Earl Russell obtained the release of one McHugh, on 4 July 1864, who had been in Lafayette since the end of 1863.

Two officers of the 20th Infantry (in plain clothes) were killed at Kamakura in 1864. Sir R. Alcock observes<sup>2</sup> that this was the twelfth case of the kind, and that only in one instance (the attack on the legations at Jedo) had any penalty followed. He wished,<sup>3</sup> in rather the same casual way in which his subordinate in China afterwards desired to "run" Formosa, "to make the whole vicinity responsible if they neither prevented the crime nor secured the murderer." Vicarious justice of this kind did not suit the Japanese. They declined to do more than issue a forcible proclamation. The actual culprit and two accomplices were eventually discovered and killed. Mr. Winchester magniloquently speaks of this "great act of international justice," as though it were a kind of Geneva Arbitration; but we need spend no further time on it: only remarking that to style self-devoted patriots "ruffians," as he continually does, is to juggle with words. There is no reason to doubt that the unlucky officers would have been safe if they had respected the warning to turn back which was first given them by their assassins.

The schooner *Mermaid* was sunk by the forts of Ceuta in 1865 by a shot fired at her after (as was alleged and denied) failing to bring to and show her colours, in Spanish waters. Shots had also been fired from Tarifa at the *Mountaineer*.

"The evidence," said Lord Stanley, "appears to show that reparation is due from the Spanish Government for a great injury inflicted by the act of Spanish authorities

<sup>1</sup> 60 S.P. 1016, Russell to Napier, 4 Nov. 1863.

<sup>2</sup> *Ib.* 1096, Alcock to Russell, 20 Nov. 1864.

<sup>3</sup> *Ib.* 1102, Same to Same, 23 Dec. 1864.

upon a British vessel which appears to be proved, by clear and credible testimony, to have complied with the requisites of Spanish law, and not to have disregarded them; and to have been, after and notwithstanding such compliance (though doubtless through inadvertence), fired at with ball and consequently sunk."<sup>1</sup> The Spaniards have always been particularly careful about vessels approaching their coasts; and the ministry long stood out against the British proposition to arbitrate. Eventually, however, an arbitration agreement was signed.<sup>2</sup> £3,866 10s. 11d. was ultimately awarded to Great Britain, payable at ninety days from 20 Febr. 1869.<sup>3</sup> Payment was delayed until April 1870, when an agreed sum of £46 6s. 2d. was added for interest.<sup>4</sup>

Another Hispano-British case occurred in 1866,<sup>5</sup> the barque *Queen Victoria* being seized by a revenue cutter, as was alleged, outside Spanish waters, on suspicion of smuggling. In three months she was condemned, without an opportunity of defence being afforded, and after nine months' more correspondence the Spanish authorities declared that they could do nothing to interfere with the courts. Eventually (it is not quite clear whether by judicial means, but at any rate by legal means)<sup>6</sup> the seizure was declared null and void, restitution and compensation being decreed. A British demand for an apology was quietly dropped.

Evoked by the cross-currents of nationality and

<sup>1</sup> 58 S.P. 1289, Stanley to Crampton, 12 July 1866.

<sup>2</sup> At Madrid, 4 March 1868, *ib.* 2. It contained a curious provision for the selection of two umpires, each question as it arose to be umpired on by the Spanish or British umpire according to lot: cf. p. 6 *supra*.

<sup>3</sup> *Hansard*, 18 March 1869, col. 1659.

<sup>4</sup> The writer is indebted for the last reference and for this additional information to Mr. C. J. B. Hurst, C.B., of the Foreign Office.

<sup>5</sup> 58 S.P. 1325, Stanley to Crampton, 30 March 1867.

<sup>6</sup> *Id.*, 1332, Calonge to Crampton, 20 April 1867.



religion, a curious point arose in 1865. A British Jew, Stern, purchased a business at Chabatz in Servia. On account of the anti-Semitic laws of that country, he was told that he must leave Chabatz ; but H.B.M. Consul appears to have procured him leave to remain.<sup>1</sup> His Servian Jewish subordinates were, however, ordered away. The Servian Government, said Mr. Garaschinin, would not allow Servian Jews to evade the force of the laws on the ground of their being the servants of foreign residents. Again, in Roumania <sup>2</sup> a circular was issued putting in force the law prohibiting Jews from being farmers of estates, innkeepers or rural settlers. This was said to be applicable to Austrian and Russian Jews : but was only put in force against the scum of the Jewish population, who were native Roumanians. It may become at any time a very difficult question, how far racial or religious disabilities can properly be enforced against foreigners. It may fairly be assumed that in principle these cases are indistinguishable from others, but what if the race or religion is practically coterminous with, or inclusive of, a particular nation ?

The question of the Jews in Servia and Roumania again came up in 1867. It appears that the richer Jews, who were naturalized Austrians and Russians, were unmolested. A few that were arrested were at once liberated <sup>3</sup> : though Consul Ward speaks of two or three who were driven from their homes,<sup>4</sup> and Consul-General Green mentions (29 July 1867) an Austrian Jew reported to have been cut down by an officer in the streets of Jassy. " I cannot subscribe," says Mr. Green,<sup>5</sup> " to the doctrine that the treatment of the Jews is not a subject for foreign

<sup>1</sup> 58 S.P. 734, Longworth to Russell, 10 Aug. 1865. It is possible that the capitulations in force in Servia operated to exempt him from the local law. <sup>2</sup> *Ib.* 887.

<sup>3</sup> 62 S.P. 683, St. Clair to Green, 29 May 1867.

<sup>4</sup> *Ib.* 719, Ward to Green, 9 Dec. 1867.

<sup>5</sup> *Ib.* 705, Green to Bolesco, 2 Aug. 1867

interference. The peculiar position of the Jews places them under the protection of the civilized world." But "on mature consideration" he observes that he had "come to the conclusion that official interference on my part, without its having been called for by the Jewish community, would do more harm than good"; in which he was probably right. Lord Stanley<sup>1</sup> rested the ground of British interference on treaties, according to which the Powers guaranteed Roumanian independence. (Indemnification (£470) was granted without demur to thirty Austrian Jews,<sup>2</sup> for the consequences of a mob outrage at Galaz in the following year.) Roumania energetically protested<sup>3</sup> that the virtual independence of the Principalities was of long establishment, and that its guarantee by the Powers gave them no right to interfere in their internal affairs. She sustained that it was not racial or religious hatred that provoked harsh laws against the Jews, but the economic conviction that they were useless and dangerous and should be abolished, or at any rate kept under. Their principal industry was declared to be the demoralization of the rural population by drinking-shops. The Servian Government merely relied on the fact that the Jews were an exclusive race which failed to assimilate with the nation.

Lord Clarendon eventually invited the Powers to take measures to stop "a system of persecution which is a disgrace to the country and inspires indignation throughout Europe."<sup>4</sup> Count Bismark sensibly declined to press Roumania to alter her legislation, so as to allow Jews to hold land and to sell drink. It would be an interference in the internal government of the country, which might cause the Prussian Government to be regarded in

<sup>1</sup> 62 S.P. 727, Stanley to Green, 24 April 1868.

<sup>2</sup> *Ib.* 746, Bonar to Stanley, 20 Oct. 1868; 751, Gree Clarendon, 12 April 1869.

<sup>3</sup> *Ib.* 761, note of Mr. Cogalniceano.

<sup>4</sup> *Ib.* 799, Clarendon to Paget, 23 Feb. 1870.

the future as responsible for the acts of the Roumanian. Italy thought the Powers ought to examine carefully whether they had the legal right to control Roumania.<sup>1</sup>

In 1880 the question of foreign Jews in Russia entertained the attention of the governments of Britain and the U.S.A.

Mr. Lewisohn was expelled from St. Petersburg as an English Jew, and Mr. Pinkos as a U.S. Jew. These events raised the same important question, namely the right of a state to enforce its own religious and racial ideas within its own borders to the prejudice of foreigners. Lord Granville, after inquiry, declined to interfere on the ground that the expulsion was simply in accordance with Russian law.<sup>2</sup> Afterwards, however, he wrote, "The Treaty [of 1859] applies to all H.M. subjects alike, without any distinction of creed. The expulsion of Mr. Lewisohn, therefore, appears, *prima facie*, to be a violation of the stipulation conferring reciprocal rights on the subjects of the contracting parties to travel, reside and trade in any part of their respective dominions. But by the terms of Art. 1, its stipulations are not to affect the laws, decrees, and special regulations regarding commerce, industry, and police in vigour in each of the two countries, . . ." which, however, he declared Mr. Lewisohn did not appear to have infringed.<sup>3</sup> Mr. Lewisohn was, pending the discussion, allowed to return. On an examination of the archives of the Foreign Office, it was discovered that in 1862 the British Government had come to the conclusion that "they would not be justified in claiming exemption for British Jews in Russia from disabilities to which their Russian coreligionists were liable by law."<sup>4</sup> Lord Granville's first thoughts were therefore recognized as soundest, and the matter dropped.

<sup>1</sup> 62 S.P. 801, Visconti Venosta to Paget, 17 March 1870.

<sup>2</sup> 73 S.P. 828.

<sup>3</sup> *Ib.* 833, Granville to Wyndham, 11 July 1881.

<sup>4</sup> *Ib.* 845, Granville to Thornton, 28 Dec. 1881.

The Jew question had already come up in the case of Theodore Rosenstrauss, who had been living in Kharkoff from 1863-73, and had been threatened with the closure of his emporium of "Yankee notions" on account of his religion. He obtained on two occasions the intervention of the Legation of his adopted country, the United States: but in Dec. 1873 he was told that foreign Jews could not be permitted to trade at Kharkoff. He was granted a licence at a greatly enhanced rate, but at the same time he was informed that it would not be renewed without Imperial authorization. The claim of religious equality was then put before the Russian Government.<sup>1</sup> It was replied that the law requiring Israelites to take out these expensive certificates with special Imperial authority was a racial and not a religious one.

In the case of Pinkos,<sup>2</sup> the Russian Foreign Minister hoped "that accord in the appreciation of the affair will not fail to be established, if the Government of the United States shall be satisfied that all the measures of which Mr. Pinkos complains are in perfect conformity with the Russian laws."<sup>3</sup> In the case of one Wilczynski, who was only a traveller, a permission to return for six months was accorded.<sup>4</sup>

Mr. Blaine<sup>5</sup> penned a prolix remonstrance, of appalling length. He put aside the case of foreign Jews (such as Rosenstrauss) who were subjected to special restrictions exactly because they were aliens, and limited himself to the more difficult case of general legislation against Jews.

He put forward the remarkable contention that the reciprocal grant to each other's subjects of personal rights, such as succession and suit, involved liberty to them to enter each other's territories whenever it might be convenient for the protection of such rights, in defiance

<sup>1</sup> 79 S.P. 836.

<sup>2</sup> *Ib.* 838.

<sup>3</sup> *Ib.* 842, De Giers to Foster, 13 Dec. 1880.

<sup>4</sup> *Ib.* 841, 844. <sup>5</sup> *Ib.* 845, Blaine to Foster, 29 July 1881.

of the local law : an argument which can only be regarded as preposterous. The U.S. Minister offered to read this composition to de Giers, but it is not surprising that the Chancellor requested him not to do so, "as he was very much occupied, and several persons waiting to see him." Eventually, it was announced that a Russian Commission had been appointed to consider the whole question.<sup>1</sup> It was still open in 1897,<sup>2</sup> the United States tacitly recognizing that Russia was within her legal rights.

During the war of 1867 between Brazil and Paraguay, British and U.S. subjects were detained in the latter country.<sup>3</sup> Lopez appeared anxious to emulate Theodore of Abyssinia, and declined their release, on the ground that they were under contract.<sup>4</sup> There seems no particular reason for denying to a government the right to enforce contracts for personal services *militari manu*. In some cases there were no contracts : but it may be doubted whether a general refusal of permission to leave the country during the pendency of a war might not fairly include foreigners.<sup>5</sup>

The Fenian disturbances of 1848 have above been alluded to. Further cases of U.S. remonstrance occurred in 1868.<sup>6</sup> Two naturalized U.S. citizens called Costello and Warren were convicted of treason-felony in Dublin : the U.S. House of Representatives requested the President to secure their release, on the assumption that they had been accused as British subjects for acts done in America—thus being deprived of the benefit of naturalization. Lord Stanley replied that the acts charged had been committed in Ireland.

<sup>1</sup> 79 S.P. 855.

<sup>2</sup> *U.S. Dipl. Corr.* (1897), 442.

<sup>3</sup> 66 S.P. 1293.

<sup>4</sup> *Ib.* 1298, 1306, 1310, Gould to Matthew, 2 and 22 Aug. 1867, 10 Sept. 1867.

<sup>5</sup> It was also justified as a counter-stroke to the Brazilian blockade (*ib.* 1337).

<sup>6</sup> 58 S.P. 1215.

We may almost pass over, as the acts of a despot whose brain had been affected by his terrific struggles, the imprisonment and death of foreigners at the hands of the Abyssinian Negus.<sup>1</sup> There is this to be said in justification of them—that the Negus had some ground for suspecting the persons in question of plotting against him. His insecure throne was some excuse for his drastic methods. At the same time, they were altogether too drastic for modern nerves.

Lord Clarendon in 1868<sup>2</sup> lays down in a veiled but unmistakable form the principles of the gospel of penetration:—"H.M. Government [disclaimed] any desire or intention to apply unfriendly pressure to China to induce her government to advance more rapidly in her intercourse with foreign nations than was consistent with safety, and with due and reasonable regard to the feelings of her subjects. But [they] expected from China a faithful observance of the stipulations of existing treaties," and the fullest amount of protection to British subjects resorting to her dominions, whilst reserving to themselves the right of urging further commercial concessions. In the past, he observed, the Provincial governments had been accustomed to disregard the rights of foreigners, trusting to the weakness of the Central Government. Lord Clarendon announced a preference for treating with the latter authority, with which alone Great Britain had entered into treaty, and he recommended the Chinese Government to assume and exercise supreme authority over the local governments. Even so a Japanese pundit might lecture the President of the United States on the advisability of his controlling the State executives.

It will be seen that the Foreign Secretary implicitly arrogates a power to make China "advance," subject to what he vaguely styles the "due" and "reasonable"

<sup>1</sup> 54 S.P. 1152; 60 *ib.* 1035.

<sup>2</sup> 59 S.P. 279, Clarendon to Burlinghame, 28 Dec. 1868.

wishes of her people : also that he does not attempt to define what "protection" means. He secured from Mr. Burlinghame, who was the intermediary between the two governments, the admission that foreign force might be directly interposed for the immediate protection of life and property.<sup>1</sup> This, of course, is as though Japan were to claim a right of bombarding San Francisco in order to secure the protection which the Federal forces might be unable to afford.

Perhaps it is hardly right to quote Chinese affairs as of any value in the treatment of the question. However, it may be permissible to mention the events which transpired in 1868 in Formosa. A British firm leased a warehouse at a place called Banca from a person who had no title : they had much difficulty in obtaining possession, and when they did, a mob attacked their agents with guns, knives, spears and stones, half killing them.<sup>2</sup> The officials gave them no shelter, much less active assistance. The warehouse was seized by partisans, who began to levy a voluntary rate "to frighten the English and drive them out of the place." The assigned reason was the destruction of the camphor monopoly. The Acting Consul at Tamsiu bitterly laments his lost "prestige" and complains of the bad administration of Formosa, suggesting that a supreme authority ought to be appointed for the north end of the island ; and he modestly nominates a candidate for the post. He suddenly changes front in a couple of weeks, and proclaims that "prestige is restored." Without even the threat of "force or violence or either of them," he had obtained the infliction of penalties on the principal rioters, compensation for lost effects, and a polite proclamation of friendliness.

Another Brito-Spanish case of 1868 was that of the *Garibaldi*.<sup>3</sup> This schooner was captured as a smuggler

<sup>1</sup> 59 S.P. 282, Clarendon to Alcock, 13 Jan. 1869.

<sup>2</sup> 60 S.P. 1024, Holt to Alcock, 14 Oct. 1868.    <sup>3</sup> 59 S.P. 966.

by the Spanish *Viva*, after a chase which arose within territorial waters, if indeed it was not completed there. The British diplomatists allowed the matter to drop. The vessel was clearly engaged in contraband traffic.

During the Cretan insurrection of 1868, a demand was incidentally made by Turkey on Greece for satisfaction on account of acts of violence committed on Ottoman subjects in Greek territory. Mr. Delyannis<sup>1</sup> disclaimed all knowledge of such cases—except as regarded one Albanian, killed at Syra. His assailant had escaped to Crete, in spite of the efforts of the local authorities. Further complaints were made of assaults, one on a Turkish consular official at Syra,<sup>2</sup> and the original complaints were repeated, though without particularity, by Photiades Bey.<sup>3</sup> The Conference which eventually met in Paris in 1869 determined to leave all such matters to the Greek tribunals: a somewhat facile course.<sup>4</sup>

The master of a British ship having been shot by mutineers at Fray Bentos, in the Banda Oriental, the Consul offered to send them to England for trial (10 Aug. 1870).<sup>5</sup> The offer was not accepted, and the men were allowed to volunteer for service against Argentina.

Sir E. Thornton<sup>6</sup> gave the United States £11,000 with £9,000 interest (but without *lucrum cessans*) (11 July 1870), in an arbitration arising out of the wreck of the whaler *Canada* in Brazil. Imperial officers had gone on board and interfered with the efforts of the captain to get his ship off the reef on which she had struck. Thornton found that the measures taken by them were impolitic, and caused her total loss. It may be observed on this case that the arbitrator mistook his function. He was not sitting as a municipal judge to pronounce on the propriety of certain nautical measures: that might have

<sup>1</sup> 59 S.P. 651, Delyannis to Photiades, 13 Dec. 1868.

<sup>2</sup> *Ib.* 694.

<sup>3</sup> *Ib.* 722, 747.

<sup>4</sup> *Ib.* 812, Lyons to Clarendon, 23 Feb. 1869.

<sup>5</sup> 67 S.P. 130.

<sup>6</sup> 66 S.P. 204.



been done in Brazil. His duty was to say whether a foreigner has any right of complaint when the local authority takes, in its discretion, ill-judged measures for the treatment of a stranded vessel. The local power is not bound to have a strange vessel sticking on its reefs, and Sir E. Thornton's exaggerated view of the powers of the master—true enough as long as the vessel is on the high seas—is out of place as soon as she strikes. The award must therefore be considered to have proceeded on a misapprehension.

We have now to deal with the deplorable acts of Turkish brigandage in Greece which ended in the death of well-known Italian and British subjects in 1870. Irritation at the unsafe condition of the country made English opinion intolerant of the attitude of the Greek Government. Britain demanded of Greece the release of her subjects without any regard to the necessities of Greek police administration. Greece declined to buy the safety of her visitors by conceding a pardon to dangerous ruffians. The surprising offer was indeed made by Lord Clarendon to put a British man-of-war at the disposal of the criminals, for their safe conveyance to Malta, and this was actually accepted by the Greek Minister in London.<sup>1</sup> The Minister put forward the constitutional argument, that the crown had no power of pardon. Constitutional arguments do not avail to excuse the non-performance of international duty, and Lord Clarendon further pointed out that the Greek constitution had no particular validity when it suited the Greek Government to disregard it. The universal regret and horror aroused by the melancholy events which supervened on the attitude of the Greek Government have not even yet ceased to impress the popular mind, and they obscure to some extent the real issue. There is no natural inherent right in the human individual to go to Marathon. If he chooses to run a known risk and

<sup>1</sup> 65 S.P. 669, Clarendon to Erskine, 21 April 1870.

goes, accompanied by horse and foot, he cannot complain if he drives off from his infantry and falls a victim to capture. Nor can his government ask that the local authorities shall break their own law and disable their own administration, in order to secure his release.

The Greek Government, in the exercise of its unquestionable discretion, preferred to send an expedition to observe the brigands, and a collision ensued. Thirteen bandits were killed or taken, out of twenty-one, but four of the foreign party were murdered by them. In the light of this, the adherence of the Greeks to the letter of the constitution and the law seems somewhat pedantic. If a legal amnesty could not be granted, some assurance might have been given which would have satisfied the men.<sup>1</sup> Probably the real objection of the Greek Cabinet lay in the unwisdom of yielding to threats. As a matter of fact there has been little brigandage in Greece since. And the successful Abyssinian example of Great Britain was still fresh.

The Italian Minister and the British Minister (Erskine) concurred in their view. "M. delle Minerva and I did not think that we should be justified in requiring the government to persist in the conciliatory course they have hitherto pursued, after it had proved abortive. M. Zaimis has assured [us] that upwards of 600 troops are collected in the immediate neighbourhood of Oropos, and although there is not the least intention on their part to provoke a collision, *they are fully authorized to employ force should it unfortunately be necessary to prevent the escape of the brigands.*"

The Greek Government killed five of the captured brigands and paid the widow of one of the English victims £10,000.<sup>2</sup> The King and the Minister in London

<sup>1</sup> They were willing to be convicted *par contumace* and pardoned. Suppose such a pardon to have been worthless in law (as the Greeks alleged), only the brigands would have been the sufferers.

<sup>2</sup> 65 S.P. *passim*.

expressed the utmost concern, and expressions reflecting on the disturbed state of Greece were not officially resented.

More fortunate were Messrs. Bonnell, who were captured the same year by brigands in Spain, near Gibraltar, and taken to the mountains of Ronda. They were ransomed, and the brigands were subsequently killed with the ransom money on them.<sup>1</sup> There was, therefore, no question as to who was to pay it.<sup>2</sup> The result of their temporary success was "to awaken the cupidity of all the bad characters in these parts."

On these brigand cases, it may be added (though out of chronological order) that the attitude of Greece in 1870 was entirely justified by the decision of the British Government in 1881 not to advance money in the future for the ransom of British subjects. The occasion of this was the capture of Colonel Synge, carried off from Tricovaista, and Mr. H. Suter, carried off by Greek brigands from the Turkish village of Isvor.<sup>3</sup> Mr. Goschen, with the approval of Lord Granville, at first intimated to the Turkish Government that an indemnity would be required from Turkey, if Mr. Suter were killed, equal in amount to any ransom that might be asked for him.<sup>4</sup> This is quite absurd: the brigands might have asked a couple of millions; moreover, it is to adopt a false measure of damages. It would place it in the power of any rebel to inflict losses on the government by committing crimes against foreigners.

Assim Pasha<sup>5</sup> took the view that the brigands had come secretly by water; their presence was not a consequence of the negligence of the Turkish local officials to keep the population in order; it was a result of the

<sup>1</sup> 65 S.P. 849.

<sup>2</sup> But the Spanish Cabinet had decided to do so, *ib.* 856, Layard to Clarendon, 11 June 1870. <sup>3</sup> 72 S.P. 1167.

<sup>4</sup> *Ib.* 1168, Granville to Goschen, 19 April 1881.

<sup>5</sup> *Ib.* 1171, Goschen to Granville, 15 April 1881.

effervescence caused by the then dispute with Greece, and was a fortuitous circumstance which could not have been foreseen or guarded against. But Mr. Goschen could refer to the constant complaints which had for long been made to the Porte of the insecurity of the locality. He "could allow of no excuse in palliation of the seizure by armed bands of brigands of a British subject peacefully residing under the protection of the Ottoman authorities." In this he no doubt went too far. Energetic representations are possibly required in pressing demands upon the Porte, and treaties give Great Britain some right of complaint if it fails to provide security. But we need only refer to the attitude of the British Government towards the Argentine in 1871 to see that foreign nations have no title to complain if the frontier provinces of others are unsafe or disturbed. And Assim promptly disclaimed the Goschen doctrine.<sup>1</sup> Bands, directed, in the first instance, politically against Turkey, could not in fairness make her responsible for their incidental evil deeds.

Turkey, out of consideration for Mr. Suter's safety, stayed her hand in taking active steps against the bands with which the district swarmed. This could not go on indefinitely, and the British Government paid under protest the £15,000 demanded. It had paid £12,000 for the release of Colonel Synge, detained from 19 Feb. to 22 March 1880, and it now<sup>2</sup> circularized the consuls in Turkey, Servia, Roumania, Greece, Italy, and Spain, informing them that in future, where British subjects were captured in localities to which they ventured for their own business or pleasure, no advance for the purpose of ransom would be paid from the British Exchequer. Lord Granville adopted Goschen's arguments, and continued to urge them upon the Turks.

During the Italian operations against Rome in 1870, damage was done to vineyards at Terrione, belonging

<sup>1</sup> 72 S.P. 1172, Assim to Goschen, 21 April, 1881; 1173, Assim to Musurus, 23 April 1881.

<sup>2</sup> 22 July 1881, *ib.* 1183.

to Irish Dominicans, owing to the transit of cannon.<sup>1</sup> Ecclesiastical property belonging to Austrian, British, and Irish associations was subsequently thought likely to be legislatively confiscated. An assurance was given that all such property belonging to British subjects would be respected.<sup>2</sup> Otherwise, the difficult point would be raised,—How far can a government, by the operation of an impartial law, deprive foreigners of what they have considered as their “property”? In what did their rights consist? How far can they override the eminent domain of the territorial power? Can it destroy them on religious grounds? The court of King Victor thought it safer not to provoke such controversies. We cannot see that its conduct in carrying through a measure of confiscation could have been made the subject of international reclamations. If the ecclesiastical property of foreigners alone, or of one nation alone, had been attacked, there might have been reasonable ground for complaint.

Measures were, however, taken for the expropriation of the Orders.<sup>3</sup> This was characterized by Mr. Jervoise (British Agent) as a modified form of that confiscation which had been expressly disclaimed. The Queen’s Advocate did not share this view, and Lord Granville declined to remonstrate.<sup>4</sup>

A Mr. H. D. Jencken, being in Lorca (Murcia) on legal business, was, in consequence of a casual remark to a stranger with a child, savagely attacked by a mob in consequence of some absurd superstition. Several persons were sentenced to imprisonment, and Lord Clarendon expressed an opinion that as Mr. Jencken had gone to Spain in the discharge of professional duty (which might

<sup>1</sup> 62 S.P. 444, Jervoise to Cadorna, 3 Oct. 1870.

<sup>2</sup> *Ib.* 450, Paget to Granville, 25 Oct. 1870; *ib.* 459, Granard to Granville, 7 Nov. 1870; *ib.* 464, Jervoise to Granville, 5 Nov. 1870; *ib.* 472, Hammond to MacMahon, 24 Nov. 1870.

<sup>3</sup> 62 S.P. 498, 519.

<sup>4</sup> *Ib.* 534, Granville to Paget, 27 Jan. 1871.

have caused ill-will against him), and being therefore entitled to rely on the local authorities for protection, the Spanish Government might properly be approached with a view to compensation. The assailed person had, however, disclaimed the idea of exacting compensation from the members of the crowd who attacked him, and, on this ground, Sagasta declined to pay any.<sup>1</sup>

A gentleman named Roberts was assassinated on 2 July 1871 at Cadiz, and complaints were made of the dilatory attempts to secure the culprit, and of what was called by the British Minister, a "scandalous denial of justice," "the criminal's political friends being supreme in Huelva."<sup>2</sup> But Lord Derby was advised that no further steps could properly be taken. The Minister remarked that this was one instance among many of the difficulty and impossibility of obtaining justice from the courts where a foreigner was concerned.

A decision<sup>3</sup> was given in 1875 by the umpire in an arbitration arising out of an insurrection in Colombia in 1871. The Colombian Government was held liable to pay the U.S. Government compensation for the use of a steamer by the rebels. The true ground of this decision was that, by the treaty of peace with the latter, the government bound itself to pay for the hire of the steamers, etc., they had used. This was of course not a contract in favour of third parties; but it showed that the government had adopted the acts of the insurgents. "It is clear that 'some one' ought to pay; that 'some one' could not be Herrera and Diaz, because their responsibility was saved by the Treaty of Peace. We have then to fall back on the state which granted the amnesty, and stipulated that it would pay for the use of the *Montijo*"—says the umpire.

This reasoning is not flawless. It is not correct to

<sup>1</sup> 62 S.P. 998, Clarendon to Layard, 7 April 1870.

<sup>2</sup> 67 S.P. 630, Layard to Derby, 15 June 1874.

<sup>3</sup> By the British Minister (Bunch), July 26 (66 S.P. 402).

assume that "some one must pay." The arbitrator goes on to lay down much more questionable doctrine. "It was the clear duty of the President . . . to recover the *Montijo* from the revolutionists. It is true that he had not the means of doing so, there being at hand no naval or military force of Colombia sufficient; but this absence of power does not remove the obligation." The United States would have been surprised if Great Britain had held them liable for their "absence of power" in the Southern Confederacy! The arbitrator struck out the claims of the crew (who were paid regularly) and the claim for interest, and allowed £4,300.

Bahia Blanca, 300 or 400 miles south of Buenos Ayres, was in 1871 the scene of Indian inroads. Several foreigners were killed, and much property destroyed. Complaint was made of the Argentine Government in having invited immigration and not having ensured safety; also for having wantonly provoked the natives by ill-treatment. But it was explained that in these unsettled regions complete security could not be expected.<sup>1</sup> Some of the "California colonists" (perhaps desiring nothing better) then suggested that they might be dispensed from the obligation of cultivation, and armed to undertake operations against the Indians.<sup>2</sup> After this, the Argentine Government intimated plainly that if Great Britain assumed a right of interfering with the manner in which Argentina managed her colonies, they would be compelled to deny it categorically.<sup>3</sup> Nevertheless, the British Minister declared "that he must make himself heard," when the civilized Indians indulged what he very elegantly terms "the vice of manslaughter" at Tandil, within twenty-four hours' journey of Buenos Ayres. Barely a day, he said, had passed within the preceding six months with-

<sup>1</sup> 62 S.P. 909, Tejedor to Macdonnell, 11 Jan. 1871.

<sup>2</sup> *Ib.* 916.

<sup>3</sup> *Ib.* 915, Macdonnell to Granville, 22 Oct. 1871.

<sup>4</sup> *Ib.* 923, Same to Same, 13 Jan. 1872.

out one or other of his countrymen falling a victim to the knife of the taine *gauchos* or the lance of the wild Indian. That makes a total of 180 Britons slain :—and we know the names of four. The Argentine Minister refused to admit that foreigners on settling in Argentina acquired a privilege above that of natives. Seeing that twenty-eight of the marauding band engaged at Tandil had been captured, it is hard to see what more could have been done. The colonists went on protesting :—" Our position is truly critical ; for the Indians not only steal our cattle and murder our countrymen, but they sell the skins of the stolen beasts in the town,"—which reminds one of the little girl who, according to a learned magistrate, " began by blaspheming her Maker, and ended by throwing a stone at a goose."

A curious and interesting feature of this Tandil affair is that it does not appear to have been committed from motives of robbery, but was simply an anti-foreign outbreak,<sup>1</sup> directed against foreigners generally. Basques and Italians bore the brunt of it, and about forty of them perished. The authorities shot or captured the majority of the band.

Mr. Tejedor takes a sound line of argument<sup>2</sup> in his note of 22 Jan. 1872,<sup>3</sup>—" Foreigners, as soon as they arrive in a given country, are subject to its laws and to its authorities. Those laws are not alike everywhere, but they are equally binding upon him, be they favourable or the reverse to his condition as a foreigner. A foreigner . . . must address himself, in common with citizens of the country, to those authorities, must invoke those laws, and must await and submit to their decisions. Otherwise, the foreign body would constitute a state within a state—a political monstrosity." Protection to the foreigner is, he goes on, not only secured by treaty,

<sup>1</sup> 62 S.P. 928, Parish to Granville, 13 Jan. 1872.

<sup>2</sup> Compare pp. 25, 62, *supra*, written before this despatch of Mr. Tejedor's had come to the author's knowledge. <sup>3</sup> *Ib.* 934.



but by the very constitution ; but it is protection, not privilege. Foreign countries may interfere in cases of denial of justice, or of unjust persecution by the authorities. But any doctrine of special protection can only lead to the most deplorable errors and misunderstandings.

Finally Lord Granville<sup>1</sup> distinguished between the incursions of wild Indians and the outrages of the *gauchos*. For the former, however laxly the frontier had been protected, no claim could be made against the Argentine. For the latter, she was responsible if default could be shown in affording due protection. Mr. Macdonnell replied petulantly, that the settlers did not want compensation, but moral support. The Foreign Secretary thereupon addressed a polite note of remonstrance to the Argentine, and the matter dropped.

It would doubtless be impossible to hold nations responsible for the conduct of their enemies, however clearly they might have provoked the war. Attention may here be called to Lord Granville's express declaration,<sup>2</sup> made after consultation with the Law Officers during the Franco-Prussian War. " British subjects having property in France are not entitled to any special exemption for their property, or to exemption from military contributions, to which they will be liable in common with the inhabitants of the place in which they reside or in which their property may be situated." On 11 Jan. 1871 Granville applied the same principle to a case of requisitions made at La Ferté Imbault. This was *vis-à-vis* the Germans ; but on 23 March 1871, he writes to Lord Lyons, that after renewed<sup>3</sup> consultation with the legal luminaries, he is advised that such matters raised no ground for any claim against France. Writing to a Mr. Stuart, Lord Enfield<sup>4</sup> was directed by the Foreign Secretary to say that H.M. Government could not inter-

<sup>1</sup> 62 S.P. 935, Granville to Macdonnell, 26 March 1872.

<sup>2</sup> 65 S.P. 458, Granville to Lyons, 2 Sept. 1870.

<sup>3</sup> *Ib.* 462.

<sup>4</sup> *Ib.* 464.

fere if he received at the hands of the French Government in regard to compensation the same treatment which French subjects received. Equality of treatment was thus alone insisted on. Is it certain that it could have been exacted ?

In Hayti, in 1872, the question of indemnities for losses caused by civil war formed the subject of discussion by two Brito-Haytian commissions.<sup>1</sup> The first adopted the principle that foreigners must take the risks of such events : the second held that they must be protected. It instanced the action of France in compensating the victims of the communists ; which of course was a mistake, as the indemnities granted by France were voluntary. And the curious view was taken, that since other mixed commissions had adopted this harsher principle in favour of other nations, the " most favoured nation " clause required the decision of the first Brito-Haytian commission to be reversed. The earlier commission had in mind the Jamaica rebellion of 1865, when the Haytian General Salomon was refused compensation,<sup>2</sup> and it limited compensation to unjustifiable acts of government agents, and to cases in which it had been expressly promised.

In 1872 the French Government shipped several parties of destitute Communists to England.<sup>3</sup> " It cannot now be tolerated," said Granville,<sup>4</sup> " that any country should send its convicts to the territory of a friendly neighbouring power without previously ascertaining the willingness of such power to receive them." Mr. Thiers thought the matter a small one, though he concurred that " small punctures of the skin " might, if frequently repeated, at last produce a serious wound.<sup>5</sup> But he quite admitted the principle that, as Lord Granville phrased

<sup>1</sup> 67 S.P. 139, 153.

<sup>2</sup> 62 S.P. 584.

<sup>3</sup> 69 S.P. 1206, Lyons to Rémusat, 17 May 1872.

<sup>4</sup> *Ib.* 1203, Granville to Lyons, 16 May 1872.

<sup>5</sup> *Ib.* 1214, Lyons to Granville, 27 May 1872.

it, "England should not be made a penal settlement for France."

Three cases not strictly within our scope occurred in relation to Spain in 1873. The Spanish steamer *Murillo* ran down the emigrant ship *Northfleet*. The *Murillo's* master was suspended by the court at Cadiz for a year; Great Britain took no further steps, beyond furnishing the Spanish Cabinet with a copy of Judge Phillimore's strong remarks in the Court of Admiralty on the occasion of the *Murillo's* return to England and the proceedings against her there.<sup>1</sup>

During the Carlist War of 1873, two British steamers (the *Queen of the Seas* and the *Deerhound*) were seized on the high seas by the Spaniards, on suspicion of conveying arms to the insurrectionists. Lord Granville<sup>2</sup> pressed for restitution. The latter ship had a cargo of 1,780 rifles on board, and was found in the immediate vicinity of a disturbed district, but the insurrectionists were not recognized as belligerents, and the capture could perhaps, therefore, not be justified under the law of contraband. The Spanish Government released ship and crew, the British Minister reserving a right to demand compensation.<sup>3</sup> Apparently he did so without authority; for when the owner applied to Lord Granville for redress for his sufferings and losses, he was told that when British subjects enter into a speculation such as that in which the *Deerhound* was employed, they must not look to H.M. Government for compensation or support if the expedition prove disastrous.<sup>4</sup> It is a little curious, therefore, why they interfered at all.

The third case was that of the *Virginus*, too unimportant for our present purpose, and too well known, to need discussion.<sup>5</sup>

<sup>1</sup> 65 S.P. 446.

<sup>2</sup> *Ib.* 513, Granville to Macdonnell, 11 Sept. 1873.

<sup>3</sup> *Ib.* 519, Macdonnell to Carvajal, 26 Sept. 1873.

<sup>4</sup> *Ib.* 527, Tenterden to Stuart, 4 Feb. 1874.

<sup>5</sup> *Ib.* 98 *et seq.*

Several cases of importance occurred in Peru in 1874. Two young men of British nationality were kept on a charge of murder for nearly a year in prison ; and the prison (a disused mine) was such that " no language was sufficient to convey an idea of the filthy and pestilential hole."<sup>1</sup> Their Minister obtained their removal to Lima, and process was commenced against the magistrate who had so long delayed the proceedings. The objectionable jail was of 21 x 7 x 10 feet, and thirty-one prisoners were put there, without bed or food. Natives had no better treatment, so that the complaint could only be that Peru was treating the youths with outrageous cruelty. It will be observed that no apology or compensation was made or asked for.

The British Consul (Nugent) thought it right to pursue the matter, and expressed an opinion<sup>2</sup> that in cases brought against foreigners international law required that notice should be given to their Legation ; if they were in poor circumstances, that they should have consular assistance ; and that they should not be detained as long and treated as barbarously as Bell and Stirling. On his ultimately finding out the facts of the charge and the strength of the evidence, his enthusiasm considerably relaxed.

On 15 July 1874, the men were awarded six years' imprisonment. It was alleged that this was *coram non judice*, the judge who sentenced them being suspended.<sup>3</sup> The case was appealed, and resulted in the sentence being increased to fifteen years.<sup>4</sup> Meanwhile, Bell and Stirling were well lodged and fed. The Minister (March), who then took up the reclamations, did so in exceedingly capable fashion. While sedulously avoiding everything likely to irritate the Peruvian Government, Mr. March, in an admirable despatch of 19 Oct. 1874,<sup>5</sup> showed that

<sup>1</sup> 67 S.P. 318, Nugent to Derby, 27 June 1874.

<sup>2</sup> *Ib.* 324, Same to Same, 27 July 1874.

<sup>3</sup> *Ib.* 326.

<sup>4</sup> *Ib.* 340.

<sup>5</sup> *Ib.* 352, March to Aguera.

Bell as a minor ought to have had a *curator ad litem*, that no interpreter was employed, as required by the code, and that evidence tendered for the defence was refused—(which could only have been done in a police court in England.) The Supreme Court reduced the sentence to nine years,<sup>1</sup> and March then continued to press the fact of these irregularities having occurred upon the Peruvian Government. He agreed that it was open to the court, on the evidence, to find the accused culpable. The Earl of Derby, on the advice of the Law Officers, held<sup>2</sup> that in view of the fact that the last two trials had been fairly conducted according to Peruvian law, H.M. Government would not be justified in demanding their release. And this although “from an English point of view some of the proceedings had been objectionable, the evidence unsatisfactory, and the sentence excessive.” Sir Spencer St. John, in an endeavour to obtain a mitigation of the sentence, reported these strictures to the Peruvians, and did so without the qualifying phrase “from an English point of view.” It is not extraordinary that his efforts failed.

Another of these Peruvian cases was that of Higginson, whose complaint was that he was taken forcibly out of the British s.s. *Santiago* in Callao harbour, and thrown into prison on a charge of attempted homicide on board the vessel when at Panama, outside the jurisdiction of Peru. (The injured party was a Chilean.) Higginson was set at liberty, on the ground of irregularity, after five days’ detention among criminals: and Mr. Nugent began to ask for “some small” compensation. The Law Officers and Lord Derby<sup>3</sup> concurred that “a gross outrage” had been committed, and supported the demand for a full apology and compensation. It was necessary, however, for them to retreat from this lofty position.

<sup>1</sup> 66 S.P. 362.    <sup>2</sup> *Ib.* 388, Derby to St. John, 1 April 1875.

<sup>3</sup> *Ib.* 324 (eight days, according to *ib.* 327).

<sup>4</sup> *Ib.* 329, Derby to March, 8 Oct. 1874.

Explanations<sup>1</sup> were furnished which showed that the arrest and imprisonment were "*in due course of law as ordinarily administered in Peru*," though based on what eventually proved to be a gross error.<sup>2</sup> Great Britain was therefore "precluded from insisting further upon an apology and indemnity." Mr. Aguera, in furnishing these explanations, again laid down the doctrine that foreign settlers cannot expect to have special laws or treatment applied to them which would place them in a better condition than natives.

The next case was that of Hall, the captain of the P.S.N. Co.'s *Arequipa*. The chief engineer, dismissed at his instance, brought a prosecution against him, which resulted in his being detained at Callao. The engineer alleged an attempt to murder him on board the ship: and it is admitted that he was roughly handled. Mr. Nugent made an immediate demand for compensation, asserting that for two months the cause was delayed whilst Drs. Sucre and Rospigliori disputed which should try the case. Mr. Aguera declined to admit any responsibility for the acts of the judicature. Lord Derby took the view that the case was one in which no interference was possible.<sup>3</sup> The trial was still further delayed to a term of six months.

Perhaps the most interesting of these events, however, was the expedition of the *Talisman*. It resembles in its main outlines the expedition of the *Deerhound*,<sup>4</sup> but it issued in violence, and resulted in serious penal consequences. The *Talisman* was fitted out in Chili, and was captured on 1 Nov. 1874 at Pacocha under the British flag. She had fired on Peruvian boats and had captured a port-captain and several custom-house officers, leaving her own captain a prisoner on shore at

<sup>1</sup> 66 S.P. 389, Aguera to March, 16 Jan. 1875.

<sup>2</sup> *Ib.* 389, Derby to St. John, 7 June 1875.

<sup>3</sup> *Ib.* 339, Derby to March, 10 Oct. 1874.

<sup>4</sup> *Vide supra*, p. 162.

Pacosmayo. The prisoners taken with the ship were fairly well treated,<sup>1</sup> separated from convicts,<sup>2</sup> and permitted free communication with their Consul; but the captain (Haddock) and the men with him were imprisoned at first in "a filthy hole" without decent accommodation, and were robbed of £50 and boxes. After their detention for ten months, Lord Derby wrote strongly urging an immediate trial. It was explained that proceedings against the ship had to be disposed of first, and that evidence had had to be collected in Chili. On 12 Nov. 1875 the ship was finally condemned on appeal, and the President then set at liberty all but the captain and two other officers. The trial of the latter was endeavoured to be expedited, but the reply was that no interference with the judiciary was possible, and that the delays of the old Spanish procedure were inherent in the judicial system.

At the same time general representations were made as to the length of time for which prisoners were kept without trial. It was suggested that this was a very common occurrence.<sup>3</sup> But only four such cases were produced,<sup>4</sup> all of very serious criminal allegations.

Mr. March<sup>5</sup> draws attention to the fact that the subordinate judges in Peru have no discretion but to lodge accused persons in jail, after which the proceedings are prolonged and secret. He does not suggest that foreigners can complain of this, but recommends the conclusion of a treaty to obviate such difficulties. Lord Derby addressed a somewhat strong despatch to the Minister on the subject, and as it was communicated to Peru just at the time when the *Talisman's* crew were being

<sup>1</sup> 66 S.P. 356, March to Derby, 27 Nov. 1874; *ib.* 366, Same to Same, 19 Dec. 1874; 370, Same to Same, 26 Dec. 1874.

<sup>2</sup> *Ib.* 384, Same to Same, 20 Feb. 1875.

<sup>3</sup> *Ib.* 360, March to Aguera, 2 Dec. 1874.

<sup>4</sup> *Ib.* 390, 27 May 1875.

<sup>5</sup> *Ib.* 383, March to Derby, 12 Feb. 1875.

released,<sup>1</sup> it produced the worst possible impression. The Peruvians recalled that the trial of a native for attempted assassination of their President had proceeded for eighteen months. On 14 April 1876, the men were sentenced, most leniently, to four years' banishment.

Meanwhile Derby was taking the high ground with the Peruvian Minister in London that if the law enabled untried prisoners to be detained for over a year, foreigners were entitled to have it altered.<sup>2</sup> He made no allowance for the particular circumstances of Peru, nor for the great evils which the *Talisman's* expedition caused to that country. In reply to Galvez's very clear explanations,<sup>3</sup> he reiterates<sup>4</sup> the right "to protect British subjects from manifest injustice in a foreign country even when such injustice is inflicted in accordance with the technical requirements of the law of that country." In the concrete, he considered that it was manifest injustice to delay the discharge of the mate King on account of the pending of an appeal interjected by the captain Haddock.

Galvez declined the discussion as to the limits within which a government can maintain that it does not permit the application of the laws of another country to its subjects. That, he says, would be to abandon the principle that foreigners must submit to national law. It would put every new and rough country at the mercy of its better established neighbours. Substantially, the accused had little to complain of—they were guilty of a grave crime. Lord Derby's next note<sup>5</sup> is much more moderate in tone, and instead of insisting on immediate release, he only reserves a right to bring forward the delay as "strong ground" for compensation.

In the British Parliament a long debate took place

<sup>1</sup> 67 S.P. 228.

<sup>2</sup> *Ib.* 240, Derby to March, 13 May 1876.

<sup>3</sup> *Ib.* 254, Galvez to Derby, 13 June 1876.

<sup>4</sup> *Ib.* 257, Derby to Galvez, 20 June 1876.

<sup>5</sup> 67 S.P. 266, Derby to Galvez, 3 Aug. 1876.



about this case on 21 March 1876.<sup>1</sup> Dr. Cameron, in raising the question, expressly said, "If according to the law of Peru, it were a capital offence to steal a farthing, and a British subject chose to go into that country and commit that offence, I do not see on what grounds I could urge interference on his behalf. It would be the old case of *Que diable allait-il faire dans cette galère?*" What he complained of was the prolonged detention. And he added that the conditions of imprisonment were really much worse than diplomatists had considered them: which is confirmed by the fact that the mate was fatally shot while awaiting the result of the appeals. Mr. Bourke, in reply, said that however little our people might like the law and procedure of a foreign country, we could only claim that they should be fairly tried by the laws of those countries, and (he added) that their trial should not be protracted beyond a reasonable extent. That is a very vague, and, it is conceived, an unwarranted addendum. In the *Cagliari* case, it was the bad state of health of the prisoners, induced by the original insanitary imprisonment, that was decisive. And Bourke himself observed that quite recently in England, it was possible that a prisoner might be committed in July and tried next April.<sup>2</sup> Lord James put it that "no country had a right out of its own mere arbitrary will to detain prisoners of another nationality *beyond the time they could detain their own subjects under similar circumstances.*"<sup>3</sup> As we have seen, Mr. March quoted a case where a Peruvian had been<sup>4</sup> detained many months.

Mr. Evelyn Ashley took entire exception to this doctrine of equality, but the vigour of his language diminished the value of his observations. He wanted "gun-boats" sent to Peru—where they would probably have been blown up or rammed by the *Huascar*. Sir Stafford

<sup>1</sup> *Hansard*, 3rd Ser. vol. 228, p. 377.

<sup>2</sup> *Ib.* p. 403.

<sup>3</sup> *Ib.* p. 406.

<sup>4</sup> *Supra*, p. 167.

Northcote joined him in disclaiming the bare doctrine of equality as adequate.

Sir J. Holker, the Attorney-General, agreed that if the delay were a matter for which the tribunals were responsible, H.M. Government could not make out any claim for compensation. The prior trial of the action *in rem* which had caused the delay, he added, was as much the law of France as of Peru.<sup>1</sup> Mr. W. E. Forster, with an ill-tempered fling at "the course of Peruvian injustice," contradicted him, and said that there would be cause of complaint if trials did not take place within what he oddly called a "somewhat" reasonable time. Mr. W. E. Gladstone also disclaimed the idea that a reference to the courts absolved a government from liability. The courts must come up to some level—"the ordinary level which International Law required." He did not explain what that level was; and it is obvious that ideas of correct legal procedure differ so greatly and are so liable to be misunderstood, that it would be impossible to affirm that a tribunal did not come up to standard because its procedure involved great delay in cases of successive appeals. No one would maintain the logical position that equality is sufficient, and that a reference to a bad tribunal is enough. But practically it is very dangerous to lay down that equality is insufficient, and that any definite "level" of capacity in the courts, of perfection in the procedure, and of comfort in the jails must be provided.

Mr. O'Connor Power aptly instanced the American Fenians who had been kept for long periods in jail without a trial as suspects, and the matter dropped.<sup>2</sup>

In 1873 Mr. Fish refused to accept responsibility for

<sup>1</sup> Probably it was based on the Ord. de la Marine of 1681. It is quite in accordance with its spirit.

<sup>2</sup> At the last assizes at Carmarthen in 1908 a young labourer, tried and acquitted on a trivial charge of theft, had been in jail four months. Another person tried at Bristol and discharged had been in jail for the same time (*Law Times*, 26 Dec. 1908).

Mexicans assassinated in Texas. "Though the crime may not be without precedent, it seems obviously unreasonable, in view of the peculiar condition of the quarter where it was perpetrated, to expect that it would certainly be punished." Borderers "must not for some time to come, expect either government to insure them."<sup>1</sup> Mr. Bayard confirmed this position fifteen years later: though Mexico laid stress on the fact that absolutely nothing had been done to effect arrests. It is instructive to compare the Honduras case.<sup>2</sup> Turkey was able to cite with effect several such cases when complaints were made of the disappearance in Kurdistan of F. Lenz.<sup>3</sup>

The French ship *Phare*<sup>4</sup> was searched for arms at Corinto in 1874, and some weapons and ammunition were seized, while the master was given two months' imprisonment. A superior court thought the evidence insufficient, and discharged him. France refused to be satisfied, and eventually induced Nicaragua to go to arbitration before the French courts, which awarded France about £1,600 and costs.<sup>5</sup> The remarkable ground was taken by the court, that "importation" means clearing at the custom-house, and not bringing within territorial waters. Such an interpretation would make the repression of smuggling impossible.

The imprisonment of a naturalized U.S. subject, J. R. Santos, in Ecuador in 1874, gave rise to reclamations which were in 1894 referred to the *ex officio* arbitration of the British Minister in Quito, or his nominee. The important question of naturalization had been settled by the Treaty of 1872,<sup>6</sup> and the main dispute was as to its interpretation. A subsidiary question was whether Santos had—

"Been guilty of such acts of hostilities and unfriendliness to the Government of Ecuador as, under the law

<sup>1</sup> *For. Rel. U.S.* (1875), 973 *et passim*; *ib.* (1886), 158; *ib.* (1888).

<sup>2</sup> *Supra*, p. 83.

<sup>3</sup> Moore, *Digest*, VI. § 1020.

<sup>4</sup> Merignhac, *loc. cit.* § 111; Renault, *Rev. de D.I.* (1881), 22.

<sup>5</sup> £3,000 (75,000 frs.) was asked for,      <sup>6</sup> 65 S.P. 1317.

of nations, deprived him of the consideration and protection due to a neutral citizen of a friendly state."

A compromise was in the result arrived at.<sup>1</sup>

A case like that of the *Creole* occurred in 1875. The Peruvian vessel *Maria Luz* put into Kanagawa under stress of weather,<sup>2</sup> with coolies on board. Some were obliged to go on shore by the Japanese authorities for examination, and they refused to return. The Emperor of Russia, as arbitrator, decided that Japan was in no way responsible.

In 1874 the celebrated expedition of Japan against the Formosans took place. It was motived by the violent acts of the Formosan savages; but it was nevertheless a clear infringement of the territory of China. By the good offices of Sir T. Wade, the matter was accommodated by a treaty. The Chinese recognized the duty of preventing atrocities by their subjects, and agreed to pay compensation for the injuries done by the savages and for the improvements made by the Japanese; 500,000 taels in all.

Mention may be made of an outrage in 1874 upon a gentleman called Magee, who occupied the post of British Vice-Consul at San José de Guatemala. It was certainly a most brutal, gross, and inexcusable assault committed by the drunken local governor. The Diplomatic Corps agreed that £20,000 would be a fair compensation, but Mr. Magee declined for private reasons to make any demand on the Government. On account of the official character of the assailed and of his assailant, and the use he had made of the national forces in effecting his purpose, the Guatemalan Cabinet made a very full and proper expression of regret and took prompt and active steps. They agreed to salute the British flag: whilst the delinquent governor was shot by the passengers when attempting to board a U.S. steamer with a view

<sup>1</sup> 88 S.P. 552.

<sup>2</sup> Merignhac, *loc. cit.* § 110; *Annuaire de l'Inst. d. d. I.* (1877), 353.

to elope, and on his unexpected recovery was awarded five years' penal servitude. There remained the question of an indemnity, and as Magee did not want one for the injury to the individual, it was not easy for Lord Derby to extort £10,000 from Guatemala on the score of the insult to the official. Guatemala eventually declared that if the British Government was not content with the salute, and valued its dignity at £10,000, it was welcome to the money. The action of the American authorities was prompt and satisfactory. But Lord Derby took up the matter in an imperious spirit, which was really uncalled for, and the Guatemalan representative was unable to place the matter to him in a proper light.

Collisions on the high seas are not strictly within our province. But we have dealt shortly with the case of the *Murillo*,<sup>1</sup> and we must now just notice the case of the *Insulano*. This was a Portugal steamer, which collided with the British *City of Mecca* eighteen miles off the Tagus in Jan. 1875. She sank, and the *City of Mecca* was injured. The Portuguese court condemned the *City of Mecca*. Mr. Morier at first entertained the mistaken idea that Portugal gave an absurd and unnatural interpretation to the Regulations for preventing collision, and was urgent that the Portuguese Government should be made responsible. Eventually he recognized that the fault of the court (if any) was of a much more subtle kind,<sup>2</sup> and he agreed that "however glaring the miscarriage of justice, and however distorted the interpretation forced upon the rules of the road at sea (so long as the absolutely wrong reading of Art. 14 was not maintained), the matter must be regarded as a *res judicata* which cannot be reversed by international action,"

<sup>1</sup> *Supra*, p. 162.

<sup>2</sup> It turned on the ultimate duty of the *City of Mecca* to take measures to avoid the *Insulano's* danger (74 S.P. 1165, Salisbury to Morier, 12 July 1879).

though he was obviously not at all pleased with it.<sup>1</sup> And he still objected to the "competence" of the Portuguese courts to try the case—though we are not aware that it can be a subject of complaint by foreign nations that a court should investigate any case that it thinks proper. Whether or not they will recognize its decision is a matter for themselves.

Morier's tendency to supervise the proceedings of judicial tribunals received some check from the Marquis of Salisbury,<sup>2</sup> who explained that the law of nations and the practice of the English Admiralty alike recognized the competence of any Admiralty Court in cases "*communis juris maritimi*." The present case might have been tried by the Admiralty Court of any country in which the vessel happened to be. However, Lord Salisbury reserved the right to object diplomatically to the judgment if it should eventually appear to be wrong in principle, and to protest against its execution.<sup>3</sup> It ultimately appeared that a judgment *in personam* had been rendered against the owners, through their agents, as having committed a tort within Portuguese jurisdiction, *i.e.* within "such a space of the sea as may reasonably be considered as a dominion appertaining to each maritime nation in its adjacent waters." This was considered inadmissible doctrine; and Salisbury declared that it asserted "the right of jurisdiction over waters more distant from the coast of Portugal than is admitted by International Law." He also objected to the grounds on which the judgment proceeded.<sup>4</sup>

Lord Granville observed<sup>5</sup> that the objectionable claim of extensive jurisdiction ought to be expressly renounced: and he also justified a demand that the judgment should

<sup>1</sup> 74 S.P. 1163, Morier to Salisbury, 25 June 1879.

<sup>2</sup> *Ib.* 1165.

<sup>3</sup> *Ib.* 1163, Salisbury to Morier, 9 Aug. 1879.

<sup>4</sup> *Ib.* 1169, Same to Same, 18 Dec. 1879.

<sup>5</sup> *Ib.* 1172, Granville to Morier, 30 Sept. 1881.

be disregarded, as having proceeded on a misinterpretation of the rules for preventing collision.

The decision of the Supreme Court of Portugal H.M. Government "would not feel justified in questioning were it not that it involves international rights of the highest importance. But they are of opinion that in this case the Supreme Court has failed to give effect to the international compact relating to navigation, and that the responsibility for the miscarriage of justice resulting therefrom rests with the Portuguese Government."

This raises in a clear form the question whether the decision, incorrupt and careful, of the local court can constitute a protection to its government against the claims of other nations. Granville offered arbitration: which Portugal definitely declined,<sup>1</sup> though repudiating the unreasonable doctrine of extended jurisdiction.

Portugal asserted <sup>2</sup> that even if the *Insulano* were to blame, it was through their own failure to observe a rule of Portuguese procedure that the owners of the *Mecca* had not been accorded the benefit of the "both to blame" rule. This shows the difficulty of reopening diplomatically a case with which the municipal courts have dealt. Lord Granville could not believe that a mistake in procedure could possibly relieve the opposite party from the effects of their acts. But the difficulty is equally well shown by the point of substance. Portugal contended that even if the *Insulano* was to blame at first, in the events which happened the whole responsibility was thrown on to the *City of Mecca*. This is a doctrine not unknown to, or unrecognized by, our own courts.<sup>3</sup> Its adoption by the Portuguese tribunal hardly raised a case for diplomatic complaint of gross and patent injustice. The French courts confirmed the decision

<sup>1</sup> 74 S.P. 1176.

<sup>2</sup> *Ib.* 1180.

<sup>3</sup> See *The Margaret*, 9 Ap. Cas. 873; and particularly *The Sanspareil*, L.R. (1900) 267.

after an examination *au fond*. The further discussion of the subject was dropped.

An expedition was despatched by the Indian local government to China in 1875. On leaving Bhamo and crossing the Chinese frontier, it was attacked in Yunnan, though provided with Chinese passports, and one of its members, a Mr. Margary, was killed. The Minister at Peking (Wade) expressed himself as not content with the regrets and assurances of Prince Kung, and demanded,<sup>1</sup> somewhat peremptorily, a mixed Commission of Inquiry, new passports, and an indemnity of 150,000 taels. He subsequently modified the demand for "a joint investigation" to one for leave to a British official to attend the proceedings.<sup>2</sup> This the Chinese negotiator was willing to grant as a concession. The Chinese view<sup>3</sup> was that the attack arose from a combination of circumstances: the apprehensions of a remote province, invaded, however peacefully, by an armed force, and the cupidity and truculence of mountain robbers. In fact, Wade admitted<sup>4</sup> his embarrassment in urging on the Chinese a story which (though he was convinced of its truth) would "at the Old Bailey possibly be held to be but imperfectly supported."

Much of the friction between nations arises from the insistence of one party upon opinions which it reasonably holds, but which it is not prepared to support by sufficient evidence.

Another surprising admission of Wade's is that "such matter of offence is not of very frequent recurrence, and there is a *pars altera* which a counsel for the defence might turn to very effective account."<sup>5</sup>

The Chinese pre-consultative commission proposed to cashier the local major (tu-ssü) and minor leaders, and also the higher local civil and military authorities

<sup>1</sup> 71 S.P. 940.

<sup>2</sup> *Ib.* 978, Wade to Kung, 28 April 1875.

<sup>3</sup> *Ib.* 1090, Wade to Grosvenor, 14 Dec. 1875; 1081 *et passim*.

<sup>4</sup> *Ib.* 1087, Wade to Derby, 15 Dec. 1875. <sup>5</sup> *Ib.* 1087.



(Brigadier-General and Sub-Prefect) of the county of Momein. Mr. Wade induced the government to reinstate the former. 200,000 taels indemnity was paid, and the principle admitted that the British Legation had a right to be represented at trials arising out of alleged ill-treatment of British subjects.<sup>1</sup> An embassy of apology was also sent specially to London, and the usual proclamation enjoining kindness to foreigners was posted up.<sup>2</sup>

Apart from the special circumstances of China, this acceptance of liability seems fairly due to the facts (1) that the local authorities plainly did not take any steps to suppress the violence which was exercised (if indeed they did not organize it) or to arrest the parties; and (2) that irregular troops under the command of recognized officers were actually concerned.

We may well consider ourselves absolved from any prolonged discussion of the case of the attempt made by a British Admiral to take the Peruvian ram *Huascar* when in rebel hands at Pacocha. It seems to have been justified on the ground of piracy in the wide and technical sense. Its result was to exalt the rebel leader (Pierola) to the pinnacle of popular favour. De Horsey's action in pitting an iron frigate against an armoured monitor was daring, but its naval results were nil and its political consequences bad. The *Huascar*, he says, was "beautifully handled" by the lamented Admiral Grau. But, he naïvely observes, she was "difficult to hit," and he actually organized a torpedo expedition to blow her up in the harbour of Iquique. She surrendered, however, to the national fleet. The Law Officers considered the British action on the high seas justifiable,<sup>3</sup> and the Peruvian Foreign Minister himself thought that if the *Huascar* was not a pirate, it was

<sup>1</sup> 71 S.P. 1112, 1113.

<sup>2</sup> See the agreement of settlement, Chefoo, 13 Sept. 1876, *ib.* 753.

<sup>3</sup> 68 S.P. 759.

difficult to know what to call her.<sup>1</sup> At the same time, her "piratical" acts were very few and slender. And, according to the Peruvians, the *Shah* attacked her in Peruvian waters, and fired missiles on to Peruvian land.<sup>2</sup> If a British cruiser mutinied and stopped a French packet, should we care to see the French fleet bombard her in the Humber?<sup>3</sup>

Subsequently, war broke out with Chili, and the Chilian fleet bombarded Iquique. British private property was damaged, and neutral individuals killed.<sup>4</sup> The Consular Corps protested. The Chilian Admiral puts thus early on record the argument that towns may be mercilessly bombarded where torpedoes are used—"that treacherous weapon."<sup>5</sup> A conflict of testimony arose on this point, which serves to show how useless such a limitation is. The U.S. Minister made it clear that neutrals by continuing in a town liable to bombardment assumed all the risks incident to the situation.

In presiding over the Arbitral Commissions which sat to assess neutral damages after the Chilo-Peruvian War of 1881, Mr. Pereira, the nominee of Brazil, in accord with the Chilian contention, decided that bombardment was still a legitimate operation of war, and could give rise to no reclamation, and that a state was not liable for the unauthorized violence of private soldiers.<sup>6</sup> This was strong doctrine, but it was the decision of their own chosen arbitrator, and it is unfortunate that the neutral nations declined to proceed; and, instead, accepted lump sums from Chili,<sup>7</sup> leaving the question undecided.

<sup>1</sup> 68 S.P. 761, Drummond-Hay to Derby.

<sup>2</sup> *Ib.* 763.

<sup>3</sup> The acts of H.M.S. *Bulldog* in Hayti in Oct. 1865, when she bombarded insurgents (and was stranded and blown up), were done with the consent of the legitimate authorities: see *Times*, 19 Jan. 1866 (12 E).

<sup>4</sup> 70 S.P. 1203.

<sup>5</sup> *Ib.* 1204.

<sup>6</sup> Calvo, § 1748. The previous umpire, Mr. Netto, had taken a contrary view.

<sup>7</sup> *Ibid.*

So eminent a lawyer as von Bar, indeed, appears to share the umpire's view.<sup>1</sup>

In Sept. 1876, Peter Martin, a U.S. citizen, was convicted at Laketon, Cassiar, in British Columbia, of assault and prison breach, and sentenced to fifteen months' imprisonment. For some extraordinary reason, he was conveyed to jail in Victoria through Alaska. There he assaulted one of his jailers in a serious fashion, and on arrival at Victoria, was again tried and sentenced to a further twenty-one months. On Jan. 10 1877, Mr. Fish demanded his release, as having been taken from U.S. territory without authority, and on Sept. 25 1877 he was set at liberty.<sup>2</sup>

The Portuguese Foreign Office drew attention in 1876<sup>3</sup> to the "efforts of the Chinese to put an end to the foreign occupation of Chinese territory by rendering the position of the European colonies difficult";—in particular by establishing custom-houses and coastguard stations in their vicinity. They invited Lord Derby to join them in refusing to allow the Chinese to set up fresh customs stations. Lord Derby gracefully declined the adventure, on the plea that the circumstances of Macao and Hong Kong were not precisely similar.

The events in Salonica in May 1876, when the French and German consuls were assassinated, and a fierce retribution exacted, come rather within the scope of a work on diplomatic immunities. They recall the turbulent Thessalonica of Theodosius. "We did not insist," says Sir H. Elliot,<sup>4</sup> "upon the infliction of any penalty beyond that which is sanctioned by the law of the country." 900,000 francs were paid to the families of the consuls: a rather handsome provision. Sentences of a year's imprisonment, or less, having been passed by a court-martial on the local authorities who had

<sup>1</sup> *La Responsabilité des États, Rev. de D.I.* (1899), 474.

<sup>2</sup> 68 S.P. 1226, *et passim*.

<sup>3</sup> *Ib.* 1298.

<sup>4</sup> 67 S.P. 949, Elliot to Derby, 28 May 1876.

failed to preserve order, they were annulled and fresh sentences of severer extent passed by a special commission at the instance of the foreign representatives.

The Portuguese Government granted a monopoly of steam navigation on the Shiré and Zambesi for thirty years on Aug. 2 1876. Great Britain protested. The great means of destroying the slave trade was the encouragement of trade and navigation. Portugal was bound to destroy the slave trade. Therefore the grant was contrary to the spirit of her engagements. And the British Government intimated that they could not permit any interference with the free navigation and trade of Lake Nyassa. The Government of Portugal sustained that, on the contrary, it was precisely in order to develop trade that the concession was granted.<sup>1</sup> Asserting in principle its territorial sovereignty over the rivers within its possessions, it disclaimed any intention of interfering with access to the Nyassa. And the British replied that they only claimed access as a matter of recognized comity.

Two U.S. subjects named Condon and Melody, Fenians of 1867, were convicted of homicide and sentenced to penal servitude. After eleven years they were liberated as a concession in 1878<sup>2</sup>: Condon's health being impaired.

Of the reforms pressed upon Turkey in 1878, we need hardly speak, since they were supposed to flow from the Treaty of Berlin. They included (1) the organization of a police in Asia, under European control; (2) the institution of tribunals of appeal with European members; (3) the supersession of farmers by collectors on the Indian system (mainly also Europeans).<sup>3</sup> The acceptance of these reforms would have amounted to something like abdication, and it is inconceivable that Salisbury ever expected them to obtain the Sultan's assent. The Porte temporized.

<sup>1</sup> 68 S.P. 1349.

<sup>2</sup> 69 S.P. 1090.

<sup>3</sup> *Ib.* 1313, Salisbury to Layard, 8 Aug. 1878.

A very important question is raised by a case in Turkey in 1879. Can a foreigner be obliged to remain satisfied with personal good-treatment? or is he further entitled to complain if natives are molested on account of intercourse with him? It is difficult to decide the dilemma. On the one hand, an affirmative answer to the former question would justify a governmental boycott which could hardly be other than overwhelming. That would virtually reduce the admission of foreigners (by treaty or without it) to a nullity. On the other hand, it is an exceedingly delicate matter to interfere between a government and its own subjects. It can always claim to supervise their morals and their conduct, and such excuses for interference can seldom be absent. If it is admissible to put them aside as mere pretexts and excuses, the floodgates of foreign interference in all directions are opened. In the present case a C.M.S. missionary of German nationality, stationed in Constantinople, was arrested and deprived of papers, etc. He made no complaint otherwise of ill-treatment; but a Turkish *ulema* who had corrected some Turkish compositions for him was thrown into prison, and shortly removed to an unpleasant dungeon and sentenced to death.<sup>1</sup> The British Ambassador, with the concurrence of the German Chargé d'Affaires (regularly invoked through Berlin),<sup>2</sup> demanded release of the Turk, restoration of the papers, and removal of the Turkish Minister.<sup>3</sup>

Turkey responded that the accused had actively insulted Mohammedanism: "Ahmed est libre de devenir protestant, mais il n'est pas libre d'insulter la religion des autres."<sup>4</sup> Lord Salisbury<sup>5</sup> refused to recognize any

<sup>1</sup> 71 S.P. 596.

<sup>2</sup> *Ib.* 601, Salisbury to O. Russell, 28 Dec. 1879; 620, O. Russell to Salisbury, 30 Dec. 1879.

<sup>3</sup> *Ib.* 615, Layard to Sawas, 24 Dec. 1879; 603, Sawas to Musurus, 29 Dec. 1879.

<sup>4</sup> *Ib.* 605.

<sup>5</sup> *Ib.* 687, Salisbury to Layard, 30 Dec. 1879.

such distinction :—or rather, he declined to identify attempts at proselytism with insult. And, as the Treaty of Berlin guaranteed religious liberty, he maintained that it guaranteed the liberty of proselytizing. H.M. the Sultan, therefore, at a personal interview with Sir H. Layard, gave an assurance that no harm should actually happen to the *ulema*, that the papers should be at once returned, and that a subordinate official should be dismissed. Sir Henry naïvely adds, that as he saw that the Sultan was personally responsible for the arrest, he did not like to insist on the dismissal of the Minister.<sup>1</sup>

Naturally, the question is complicated by the fact of the religious liberty of Turks being guaranteed to Great Britain by treaty, as a matter in which she chose to take an interest.

One is apt to forget that there was a "Morocco question" in 1879. Cid Mohammed Bargash, on 18 Feb. of that year, informed the foreign representatives that the dictatorial language held by some of the consular officers in the administration of justice could no longer be tolerated.<sup>2</sup> The question was again complicated by that of "protection" or facile quasi-naturalization, which is always such a difficulty in the East. Gratitude must be felt that disputes with even the least settled American state are free from this disturbing factor. In this case, Drummond-Hay observes that foreign governments "cannot have the slightest real interest in continuing irregular protection, which is a constant source of vexatious questions . . . unless it is desired to deprive the Sultan of his rights as an independent sovereign, and to render all government in this country impossible." Taxes could not be collected from protégés : criminals escaped : from his thirty-four years' experience of the country, he could say that every year control was becoming weaker. The Italian Legation was principally

<sup>1</sup> 71 S.P. 608, Layard to Salisbury, 1 Jan. 1880.

<sup>2</sup> *Ib.* 765, Hay to Salisbury, 25 Feb. 1879.

responsible for this state of things : the French was most reluctant to put an end to it, and even wanted exclusive privileges in the interior. A Conference at Tangier failed to agree, and was succeeded by the Conference of 1880 held at Madrid, which adopted a Convention restraining the consuls from creating an unlimited number of protégés, but allowing the Ministers to do so,<sup>1</sup> even in the case of commercial agents "*censaux*," which in fact led to the re-establishment of the old abuses. Notice was to be given to the foreign representative of the arrest of any Moroccan in the service of a private foreigner : but protégés were made subject to taxation at a rate fixed in concurrence with the Powers. Moroccans naturalized abroad and returning were put to their election between expulsion and resumption of Moroccan nationality at the end of a time equal to that which had conferred on them foreign nationality.

The discontent of the Egyptian officers with the Khedive's arrangement, putting them on half-pay while he paid his foreign creditors, culminated (18 Feb. 1879) in a riot, in which Nubar Pasha and Sir C. Rivers Wilson (Egyptian Finance Minister) were attacked.<sup>2</sup> The Khedive sent a chamberlain *en grande tenue* to apologize.<sup>3</sup> As to the involved story of Egypt and the establishment of European financial control there, it would take us too far afield to say more than that Ismail's early efforts to liquidate his debts by accepting a measure of foreign control were distinctly stated by him not to be due to foreign dictation. He now repudiated the control he had invoked, and the Powers persuaded the Sultan to require his abdication, or, in plainer terms, to depose him.<sup>4</sup> Lord Salisbury's reason for British interference in what was after all ostensibly a money matter, was simply the cynical plea of the people who seized Cuba—that it was uncomfortable for a country

<sup>1</sup> 71 S.P. 639.

<sup>2</sup> 70 S.P. 1020.

<sup>3</sup> *Ib.* 1029.

<sup>4</sup> *Ib.* 1084, Salisbury to Lascelles, 18 June, 1879 ; *ib.* 1089.

to have a disorganized neighbour. After an unsettled period of two years, events again came to a head, and Britain was forced to assume complete control.<sup>1</sup>

The revolt of April 1879 removed Sir C. Rivers Wilson and his French colleague from the ministry and encouraged the military to further efforts. The removal of Riaz Pasha was extorted by them in 1881, and according to Mr. Malet<sup>2</sup> their leaders, arrested by the Khedive's Cabinet, were excusably apprehensive of the future. Lord Granville laid down<sup>3</sup> the doctrine, soon to be demolished by *faits accomplis*, that the foreign powers which exercised influence in Egypt were only entitled to regard measures, not men. England desired no partisan British ministry in Egypt.

A "ministry founded on the support of a foreign power, or on the personal influence of a foreign diplomatic agent, is neither calculated to be of service to the country it administers, nor to that in whose interest it is supposed to be maintained. It can only tend to alienate the population from their true allegiance to their sovereign, and to give rise to counter-intrigues which are detrimental to the welfare of the state."

"It would seem hardly necessary," he goes on, "to enlarge upon our desire to maintain Egypt in the enjoyment of the measure of administrative independence which has been secured to her by the Sultan's Firman. The Government of England would run counter to the most cherished traditions of national history were it to entertain a desire to diminish that liberty or to tamper with the institutions to which it has given birth."

Nevertheless, the military *emeute* of 1881 led to the joint intervention of France and England for the preservation of the *status quo*. Their Consuls-General, to the unconcealed disgust of Turkey, guaranteed support to

<sup>1</sup> *Vide*, p. 185 *infra*.

<sup>2</sup> 73 S.P. 1145, Malet to Granville, 23 Sept. 1881.

<sup>3</sup> *Ib.* 1160, Granville to Malet, 4 Nov. 1881.



the new Khedive, in curbing the financial zeal of his new Cabinet.<sup>1</sup> Their ostensible ground was the imminence of disorder : their substantial ground was the proposed repudiation by the legislature of the financial obligations of Egypt. " The reports at present received from Egypt are not of a nature to excite apprehensions of early disorder or anarchy. But matters seem to have reached a crisis when the order of things established by the Firmans of the Sultan, and by the international engagements of Egypt, . . . is exposed to a risk of encroachment." <sup>2</sup> The progress of events was accelerated by the Khedive's declining, on the advice of the foreign representatives, to exile forty officers who had been convicted by a court-martial of conspiracy. Strained relations arose between him and his Cabinet, and an Anglo-French fleet was despatched to Alexandria. This, protested against by Turkey, exasperated public feeling and the catastrophe of the riots and bombardment was the result.

" Loin de nous," said Assim Pasha,<sup>3</sup> " la pensée de contester à la France et à l'Angleterre le droit d'exiger que les intérêts de leurs sujets soient sauvegardés ; mais ce droit, qu'il me soit permis de le dire, ne saurait aller jusqu'à vouloir prendre elles-mêmes en main cette protection, et à envoyer dans le but leurs escadres dans les eaux d'une contrée appartenant au Sultan " : and, indeed, it appears that the despatch of this fleet was an ill-omened step, which made a delicate situation an intolerable one.<sup>4</sup> As against Egypt, it might be justified : the Occidentals had the king in check. But as against Turkey, there was little or no answer ; and the mistake lay in treating Turkey, the brain of the Mohammedan world, as *une quantité négligeable* :—

" Assurer, d'un côté, que les droits de souveraineté

<sup>1</sup> 74 S.P. 370 *et seq.*

<sup>2</sup> *Ib.* 380, Granville to Lyons, 6 Feb. 1882.

<sup>3</sup> *Ib.* 410, Assim to Musurus, 17 May 1882.

<sup>4</sup> It was suggested by Freycinet, *ib.* 499.

du Sultan ne recevraient aucune atteinte, et nous défendre, de l'autre, toute intervention, toute ingérence, dans les affaires d'une province ottomane, ne serait-ce pas là une contradiction qu'il serait difficile, sinon impossible, de concilier ? ”

In answer, Lord Granville said that if anything further than protection of Europeans and British interests proved needful, “ we should necessarily resort to the co-operation of the Sultan.”<sup>1</sup> Said Pasha, who succeeded Assim, accepted the assurance.<sup>2</sup> In compliance with it, Great Britain proposed a Turkish occupation : but the events at Alexandria prevented this being carried into effect. To restore the authority of her puppet sovereign, Great Britain then acted alone. “ Above all, it was essential that the observance of international obligations should be upheld ” ;<sup>3</sup> and for the security of debts similar to those which had been repudiated by Turkey, by Mexico and by Virginia, the Egyptian war began. Granville's attempt to represent the bombardment as “ an act of self-defence ” on the part of the fleet, is too transparent for criticism. The ships could have gone away.

Count Kálnoky, invited to give an Austrian mandate to the novel proceedings, declined (as did Bismark). England and France had pursued an Egyptian policy which he had not always been able to approve. It had led to the present difficulties, and he did not desire to be mixed up with them.<sup>4</sup>

Upon the establishment of British influence, the British Government had no hesitation in altering the financial arrangements to which such paramount value had been attached.<sup>5</sup> The Dual Control, which the Khedive had solemnly promised in March 1879 should revive, he was now required to abolish. But the crucial step was

<sup>1</sup> 74 S.P. 415, Granville to Dufferin, 22 May 1882.    <sup>2</sup> *Ib.* 420.

<sup>3</sup> See a good summary of the whole history in *ib.* p. 490 (Granville to Dufferin, 11 July 1882).

<sup>4</sup> *Ib.* 532, Elliot to Granville, 21 July 1882.

<sup>5</sup> *Ib.* 1318.

taken on the occasion of the destruction of the Egyptian expedition, sent under General Hicks to the Soudan. Granville laid it down that any Egyptian ministry which did not carry out the advice of the British Government must cease to hold office.

This step having been taken, interference in minor matters, such as the suppression of French newspapers in Egypt, followed as a matter of course. The printing office of the *Bosphore Egyptien* was seized, and the French consular officer, who was there to protest, technically assaulted. M. de Freycinet<sup>1</sup> protested warmly, and required the restoration of the printing plant, and penalties to be inflicted on the police. The British were inclined to put forward the Egyptian courts as the proper channels of redress; but it is obvious that a government must be directly responsible for the acts of its own agents. In the Guatemalan case, above mentioned,<sup>2</sup> it could not have been a satisfactory answer, that the Guatemalan courts were open to process by the injured vice-consul. A government may indeed disclaim responsibility for the acts of its tribunals: international respect for forensic justice goes so far. But it is a very different thing to claim that its own tribunals shall alone pronounce upon its own extra-judicial acts, and upon those of its officers. Eventually Lord Granville agreed that the office should be reopened and that the British and Egyptian Governments should apologize. Naturally, in these circumstances, the demand for penalties on the police was dropped. The contention that a reference to the courts was sufficient answer is disposed of by Mr. Phelps when discussing the seizures of U.S. vessels in Canadian waters,<sup>3</sup> though his arguments, as we shall see, hardly applied to that case.

The arrangements for the Chinese court which was established by treaty to have cognizance of offences

<sup>1</sup> 76 S.P. 1062, Lyons to Granville, 14 April 1885.

<sup>2</sup> *Supra*, p. 171.

<sup>3</sup> 77 S.P. 573, Phelps to Iddesleigh, 11 Sept. 1886.

committed by Chinese in the Foreign Settlement at Shanghai were revised at the instance of the foreign governments in 1880. It is curious to note the Chinese suggestion that <sup>1</sup>—"in the interests of justice and fairness, neither party shall employ Western attorneys!"

Mr. G. F. Seward's memorandum <sup>2</sup> on the subject is a very able exposition of ex-territorial jurisdiction. "If it is not the law of the plaintiff or of the defendant which is to be applied," he pertinently asks, "and decisions are to follow broad lines of justice and equity, whose ideas of justice and equity are they to be?"

The question of the liability of goods to inland taxation had exercised the diplomatic body in Peking about the same time. A long series of twenty points was raised <sup>3</sup> and submitted to China. It is important to consider the replies in detail.

1. Goods, though allowed to land, were taxed on removal from the foreign merchant's warehouse. *Ans.* This is not a taxation on import, but after import. However, it has ceased.

2. Transit duties are levied in the interior. *Ans.* Denied; (unless no proper transit certificate has been obtained).

3. Transit certificates are sometimes refused or their issue hampered. *Ans.* Denied.

4. And are not respected. *Ans.* There is a legal remedy in such cases.

5. Or are made the subject of vexatious delays. *Ans.* Ibidem.

6. And are not recognized beyond the last barrier. *Ans.* Why should they be?

7. Trading is hampered by absence of inland warehouses. *Ans.* There is no legal impediment to foreigners acquiring them.

8. Inland toll-bars are established capriciously. *Ans.* Not without high legislative authority.

<sup>1</sup> 72 S.P. 1023.

<sup>2</sup> *Ib.*

<sup>3</sup> *Ib.* 392.

9. Inland tariffs are not accessible. *Ans.* Partly admitted.

10. Receipts for inland duties are not given. *Ans.* There is no obligation to do so.

11. Exaction of illegal duties is never penalized. *Ans.* There is a legal remedy.

12. Their recovery back is very difficult. *Ans.* So is anything involving sharp conflicts of testimony.

13, 14. Export duties are levied on Chinese produce before delivery to the purchaser. *Ans.* They have been so for two hundred years.

15, 16. And an additional half-tariff duty. *Ans.* Denied : unless the produce has been worked up into a new article in the interval between purchase and export.

17. Export duties have been levied on duty-free goods carried coastwise. *Ans.* Only *per abusum*.

18. And differential duties. *Ans.* Denied.

19. The rate of exchange is arbitrarily fixed. *Ans.* Not admitted.

20. Tonnage dues are not exclusively applied for the benefit of navigation. *Ans.* Not admitted.

In 1881 an international congress of socialists was prohibited at Zurich.<sup>1</sup> The right of associated propaganda was recognized as a *political* right, which could constitutionally be refused to foreigners. This interpretation was sustained by the Federal Court.

<sup>1</sup> See d'Orelli, apud *Rev. de D.I.* (1882), 473.

## CHAPTER V

### ILLUSTRATION (*continued*)

IN 1881, the case of a Mr. J. Dixon engaged the attention of the British and Portuguese Governments. He had built a section of railway for a Portuguese company, which had shareholders in England and Portugal. It failed; and the Portuguese shareholders applied for a new concession, which was granted subject to the purchase of the completed section by them within six months. The Oporto tribunal had the line valued at £18,000 and put up to auction. The final bid was £7,000. Mr. Dixon asserted a lien on the line. The matter went into litigation. The concessionaires, said Mr. Morier, "have only been able to work this course, and get advantages at critical moments, by obtaining from the Minister of Public Works, extensions of time, and modifications unknown to Mr. Dixon till too late." With the suit itself, Morier admitted—"of course it was impossible for me to interfere"<sup>1</sup>—but he considered the case one which involved executive acts distinct from the judicial procedure.<sup>2</sup> The lower court had allowed Mr. Dixon's claim, the Appeal Court had reversed it, and the Supreme Court, by four to one, agreed with them.

On 3 April 1883, the government issued an order which was interpreted as suspending the new company until the result of Dixon's action for indemnification was known. This naturally caused public dissatisfaction, for the railway was primarily authorized, not for

<sup>1</sup> 73 S.P. 1196, Morier to Granville, 2 March 1881.

<sup>2</sup> *Ib.* 1198, Morier to Braamcamp, s.d.

the benefit of the contractors or of the shareholders, but of the locality. The Portuguese Government throughout asserted its inability to interfere with the course of the tribunals, but the British reply was consistently made that it could at any rate refuse permission for trains to run.<sup>1</sup> On 31 Dec. 1883 the line was opened,<sup>2</sup> and it does not seem that any success attended the protests of the British Government.

When Venezuela, in 1881, proposed to put differential duties on produce arriving from the British West Indies, it was represented that Great Britain would probably consider it an unfriendly act.<sup>3</sup> It was replied that smuggling from Trinidad and Curaçao made some such measure a necessity; and a duty of 30 per cent. was accordingly imposed *ad valorem*. This was said to be contrary to the treaty of 1834,<sup>4</sup> which contained a "most favoured nation clause." The ingenious point was taken by Venezuela, that the stipulated favourable treatment only applied to the "growth, produce or manufacture" of the favoured nation. Now no differential duty was aimed at the crops, produce or manufactures of Trinidad—but only at articles (which might be the growth or manufacture of any country) which happened to be exported thence.<sup>5</sup> Even Venezuelan goods, observed Dr. Seijas, would be liable to the extra duty if they came from Trinidad. Lord Granville, somewhat non-plussed, said that this would be "to nullify the clause entirely."<sup>6</sup> The obvious comment is, that nothing would have been easier than for the clause to say "imports from Great Britain" instead of "the produce or manufactures of Great Britain," if that had been what it meant. However, the differential duty was withdrawn.

<sup>1</sup> 75 S.P. 456, Granville to Wyke, 24 Dec. 1883; 461, Same to Same, 23 Feb. 1884.      <sup>2</sup> *Ib.* 458.      <sup>3</sup> 77 S.P. 769.

<sup>4</sup> Confirming the Colombian treaty of 1825.

<sup>5</sup> 77 S.P. 771, Seijas to Mansfield, 7 Jan. 1882.

<sup>6</sup> *Ib.* 785, Granville to Blanco, 28 Jan. 1885.

We have now to consider the events of 1887 in North Africa, where the unfortunate laxity of language of Lord Salisbury and Lord Granville encouraged Mr. Ferry to commit a wholly unpardonable aggression on a friendly nation. Mr. Stanley Lane-Poole's emphatic condemnation of French behaviour in this matter is not a word too strong. It was preluded, too, by a singular incident especially affecting British interests. Mr. Jos. Levy, as an adjoining proprietor, was alleged to have by Tunisian law a right of pre-emption (*scheffa*) over the extensive and valuable domain styled the "Enfida." The Société Marseillaise offered £100,000 to the proprietor for it. Mr. Levy, as stated in an able and succinct despatch of Mr. T. F. Reade, the British Consul-General,<sup>1</sup> asserted his *scheffa* claims. These were alleged to be barred by the exception from the sale of a narrow march bordering on Levy's property.<sup>2</sup> Levy entered formally on possession, as required by law. The French consular chancellor ejected him by force,<sup>3</sup> and the French Government sent the *Friedland* to Tunisian waters, where she was followed by the British *Thunderer* and a despatch boat. Both governments agreed to leave the matter in the hands of the Tunis courts '—an obviously proper decision.

But here we have an instance of the difficulties attending the concession of undefined rights of protection to foreigners. The French company had bought the land: were they to be protected in an absolute ownership such as they were familiar with? Or were they to have sprung on them the peculiar incidents of the local law? In this case, the Convention between Tunis and Britain expressly

<sup>1</sup> 72 S.P. 1330, Reade to Granville, 6 Dec. 1880.

<sup>2</sup> *Ib.* 1331, Lyons to Granville, 17 Jan. 1881.

<sup>3</sup> *Ib.* 1332, Reade to Granville, 17 Jan. 1881. The French account was that he was merely present in his notarial capacity: *ib.* 1346, Granville to Lyons, 5 Feb. 1881. The difference is not very material, and we may accept the latter version if we please, though the French official on the spot does not adopt it (*ib.* 1350, Roustan to Reade, 17 Jan. 1881).

<sup>4</sup> *Ib.* 1347.



subjects the British purchaser's rights to the incidents of the local law. The French Convention ran to the same effect.<sup>1</sup>

Lord Salisbury has been ill-naturedly called "a lath painted to look like iron"—Lord Granville "the iron hand in the velvet glove." The latter found his action in Tunis fatally compromised by the indiscretions of the former. "*Faites à Tunis ce que vous jugerez convenable*," Waddington cited him as having said at Berlin.<sup>2</sup> Asked to deny a contemporaneous rumour to that effect, his lordship denied that he had ever "offered the annexation of Tunis to France"—which was perfectly true. Writing to Lord Lyons in Paris, he declined to admit the verbal accuracy of Mr. Waddington; but he avowed that the Queen's Government felt that it was inevitable that France might, when she chose, "press with decisive force" upon the Government of Tunis, and that it viewed the prospect without reluctance. The notion that because France had done well in Algeria, she was entitled to walk into her neighbours' houses and set them in order, wherever British interests were not affected, is characteristic of Salisbury's lawless amiability.

Lord Granville took up a far more dignified position. "I said that, in the view of H.M. Government, Tunis was a portion of the Ottoman Empire, to dispose of which Great Britain had no moral or international right. But [it] had no jealousy of the influence which France, from her greater power and her high civilization, exercised and was likely to exercise."<sup>3</sup>

The French in Tunis now put forward a series of complaints based chiefly on the disturbed state of the Algerian frontier. As we have seen, a nation cannot be expected to guarantee frontier security, or to make things everywhere comfortable for foreigners. A more serious

<sup>1</sup> 72 S.P. 1354, Granville to Reade, 19 April 1881.

<sup>2</sup> 73 S.P. 437, Waddington to d'Harcourt, 26 July 1878.

<sup>3</sup> *Ib.* 443, Granville to Lyons, 17 June 1880.

accusation was the charge that frontier tribes had made incursions into Algeria : and the French, in April 1881, decided to quiet the borderland themselves, entering Tunisian territory if necessary, and inviting the co-operation of the Bey. The latter would have been well advised to have taken Lord Granville's ~~strong~~ advice to co-operate with the French forces.<sup>1</sup> If Tunisian case was that the frontier disturbance . . . not exist : and the opportunity was lost. Too late, a separate expedition was despatched by the Bey.

There never was a clearer case of wolf and lamb than this action of Jules Ferry towards Tunis. By July, we find St. Hilaire admitting that the object of the French was "only" to make the Regency a well-governed, well-ordered, and prosperous country.<sup>2</sup> It would be distinctly amusing if China should in a few years conceive that she had the same mission to fulfil towards a decadent France !

Italy, which had had serious views on Tunis, managed to exclude France from Tripoli.<sup>3</sup> Refused participation in the Dual Control of Egypt, she proceeded to peg out a claim in Southern Egypt for herself, and pitched upon Assab Bay, where an Italian station had been established *de facto* for some years. A question of the sovereignty of Egypt in the locality immediately arose. Italy disclaimed all intention of making any military use of the Bay. But she stationed a corvette there, the commander of which had instructions to keep off the Egyptian forces. The Egyptians then invoked British assistance,<sup>4</sup> but the government, though concurring in their view of the facts, declined aid in the circumstances. The negotiations throw a bizarre light on the relations of the moment between Egypt and Great Britain.<sup>5</sup> The British Govern-

<sup>1</sup> 73 S.P. 449, Granville to Reade, 8 April 1881 ; Granville to Lyons, 9 April 1881.    <sup>2</sup> *Ib.* 514, Lyons to Granville, 17 July 1881.

<sup>3</sup> *Ib.* 512.    <sup>4</sup> *Ib.* 1255, Granville to MacDonell, 5 Sept. 1881.

<sup>5</sup> See the despatch of Mr. Malet, 28 Nov. 1881, *ib.* 1265, regarding the attitude of the Egyptian Cabinet : and their Memorandum, p. 1273.

ment negotiated a draft Convention with Italy, by which Italy was to acquire Assab from Egypt as the territorial power. No such Convention was signed, Egypt asserting that the terms of the Turkish firmans to Egypt prevented either country from alienating Egyptian territory, and apparently that they could not do so in concert, as long as the firmans remained unrevoked.

Arabs attacked a boat of H.M.S. *London* in Zanzibar waters in 1881 and killed the captain and four men. On the capture of two of the delinquents, Great Britain pressed for them to be put to death. The Sultan stated that he never inflicted that penalty, and the British remained content with the passing of a life sentence,<sup>1</sup> a wise course which was much appreciated by Seyyed Barghash.<sup>2</sup>

During the summer of 1881 Lord Granville attempted to obtain from the United States<sup>3</sup> the suppression of the incitements to violence which were said to be continually published in the New York *United Irishman*. This opens up a new situation. No injury is inflicted on British persons or property abroad : there is only the first stage of preparation for possible future injuries in England itself. Probably it is a sufficient answer to such complaints, that the complainant is as capable of preventing the nefarious scheme from coming to fruition as the territorial power is of preventing the agitators from continuing their work of propaganda. If there was any proximate act of open force in preparation, Mr. Blaine evinced a willing desire to frustrate it. But freedom of speech, even to the extent of licence, he could not promise to restrain.<sup>4</sup> At the same time, it was quietly intimated<sup>5</sup> that the United States would not "take up too warmly the cause of their citizens who went to England and Ireland with the express object of fighting, and of then appealing to their government

<sup>1</sup> 73 S.P. 695 *et passim*.

<sup>2</sup> *Ib.* 699.

<sup>3</sup> 74 S.P. 1179.

<sup>4</sup> *Ib.* 1182, Thornton to Granville, 27 June 1881.

<sup>5</sup> *Ib.* Granville to West, 27 April 1882.

for protection." It was considered that there was no reason why such Americans should be entitled to better treatment than Irishmen. Nor was it inclined to protect persons who came over to America simply to acquire a colourable citizenship, and then to return to Ireland—a practice which seems to have been not unknown.

It is instructive to compare the indignation with which the British Government viewed the prolonged detention of prisoners without trial at Naples and in Peru, with the calm way in which it crowded Irish "suspects" into prison in 1881. One such "suspect," J. B. Walsh, was imprisoned from March to June, when Mr. Lowell wrote a very mild remonstrance.<sup>1</sup> Its tame character was no doubt due to the lesson which the United States had learnt in 1862, when they were obliged to claim similar powers for themselves. Lord Granville<sup>2</sup> "declined to recognize any distinction between the liability of foreigners and British subjects in respect to unlawful acts committed within the limits of British jurisdiction, or to admit any claim to exemption on behalf of any person, whether alien or citizen, from the operation of the laws which equally affect all persons residing in the dominions and under the protection of the Crown. . . .

"The right of every state to subject foreigners within its limits, no less than its own subjects, to every law made for the maintenance of law and order<sup>3</sup> is an undisputed principle of the law of nations, and is a right necessarily inherent in the sovereignty of every independent community." He quotes Portalis and Buchanan, and disclaims any special discrimination against Americans. Details of the charge against Walsh were refused—if this had taken place at Naples!—and he was still in jail on 1 Sept., when Mr. Lowell wrote to say that his life was in danger by reason of his incarceration. On 11 Nov. he was dis-

<sup>1</sup> 73 S.P. 1222.

<sup>2</sup> *Ib.* 1224, Granville to Thornton, 24 June 1881.

<sup>3</sup> Why this qualification?

charged for reasons of health.<sup>1</sup> Denis Hayes O'Connor was imprisoned on 22 Oct., and was still in jail, and likely to remain there, in the following February. Patrick Slaterry, arrested in July, was in jail in April, and there were many other cases. "Without wishing to appear unreasonable," the President hoped, in March, that early trials would be granted.<sup>2</sup>

Granville, in a long despatch,<sup>3</sup> reiterated his justification. It is interesting to observe that he begins by observing that the arrested persons have been either ordinarily resident in Ireland, or have visited Ireland under the conditions then obtaining, and must therefore be fixed with knowledge of the exceptionally severe legislation in force. This is, of course, to meet the ancient objection that the territorial law must not be a trap for ignorant foreigners. He avails himself of Seward's declaration made in 1861 (in a note of 14 Oct., to Lyons), that British and Americans were treated with equality, as though that were sufficient: and also of a despatch of the same diplomatist (10 March 1866, to Adams) in which he stated that "Americans, whether native or naturalized, owe submission to the same laws in Great Britain as British subjects, while residing there, and enjoying the protection of that Government. We applied the converse of this principle to British subjects who were sojourning or travelling in the United States during the late war."

Frontier troubles engaged the attention of the North American governments in 1881-3. The U.S. Government asked the British to keep Canadian Indians from crossing over into their territory of Montana, where they were alleged to shoot cattle and steal horses. The difficulty of controlling such long frontier lines was urged<sup>4</sup> by the British Minister in Washington: and no one drew the inference, as a necessary one, that Great

<sup>1</sup> 73 S.P. 1229.

<sup>2</sup> *Ib.* 1232.

<sup>3</sup> *Ib.* 1234, Granville to West, 6 April 1882.

<sup>4</sup> 75 S.P. 60.

Britain must evacuate a district in which she could not make her will respected. The grievances of the Montana settlers were not inferior to those of the Algerian colonists against Tunis, or of the *Nisero's* crew (*infra*, p. 198) against Holland. The United States, however, notified Great Britain in 1883<sup>1</sup> that Canadian Indians found south of the border would be pillaged and expelled, and proposed that reciprocal liberty should be granted to each other's troops to cross the boundary line.<sup>2</sup>

In Feb. 1882<sup>3</sup> a shooting party from the *Falcon* and *Cockatrice* landed at Artaki, in order to shoot woodcock. The two captains were set upon by shepherds and mauled. Judicial investigation was promised, but further details are wanting. It does not seem that more than that could be demanded.

Another Peninsular maritime case of 1882<sup>4</sup> was the celebrated one of the *Léon XIII.*, which vessel went to Singapore in March of that year with imprisoned British engineers on board. A writ of *habeas corpus* was served on the master: he was arrested in default of an answer, and sent to jail for six months—the steamer meanwhile escaping. The peculiar position of a foreign ship in a strange harbour takes the case out of the ordinary category. The ship's company cannot be expected to make themselves acquainted with the laws of the whole world. At the same time, by accepting the hospitality of the foreign port, it is fair to conclude that they take the risks of its judicial institutions. In the case of the *Tangier*,<sup>5</sup> which was fired at by the authorities of Carthage in November, to prevent her leaving the port whilst an alleged injury done by the ship to the quay was being investigated, Lord Granville firmly objected to what was done, as a dangerous and unnecessary departure from the usual signal to stop—a blank cannon-shot. The port-captain was in consequence dismissed, and,

<sup>1</sup> 75 S.P. 74.<sup>2</sup> *Ib.* 77.<sup>3</sup> 73 S.P. 1193.<sup>4</sup> 74 S.P. 1191 *et seq.*<sup>5</sup> *Ib.* 1212 *et seq.*

*e converso*, any claim for compensation was abandoned by the British Government.<sup>1</sup>

Note may be taken here of the attitude of the Netherlands Government in respect to the capture (Dec. 1883) of the shipwrecked crew of the *Nisero* by the Râjâ of Tenom (Sumatra), who was in virtual insurrection against them. An expedition was sent by the Dutch authorities against the Râjâ. The only result of the expedition was to raise the Râjâ's terms. British mediation was then pressed upon Holland.<sup>2</sup> After referring to the chronic state of hostilities in Acheen, provoked by the repressive commercial policy of Holland, Lord Granville says :—" H.M. Government do not wish to enter into the causes of these hostilities, nor do they dispute the strict right of the Netherlands Government to make war on the Ruler of Acheen ; but looking at the provisions and objects of the Treaties [between Britain and Holland relating to the East Indies], at the prolonged captivity of British subjects in Tenom, and at the detriment caused to British interests by the existing state of affairs in Acheen, they consider that they are fully justified in offering their mediation for the restoration of peace and the re-establishment of trade on a basis of commercial intercourse more consistent with the spirit and intention of the general settlement effected by the Treaty of 1824."

This was to travel out of the particular question of the Râjâ's misdeed, and to open up the general question of commercial policy. Besides, the Dutch could not admit Tenom as an independent power for mediation purposes. Eventually a British proposal for joint action against the Râjâ was accepted. He was promised that his ports should be reopened to trade, " unless he rebelled again," and Granville<sup>3</sup> was firm in maintaining that Great Britain would retain a moral responsibility to see that the promise

<sup>1</sup> 74 S.P. 1228.

<sup>2</sup> 75 S.P. 1132, Granville to Bylandt, 31 May 1884.

<sup>3</sup> *Ib.* 1162.

was fulfilled. The Râjâ also received 100,000 rupees ; and the nineteen prisoners (except one who died) were then released.<sup>1</sup>

It is impossible to feel satisfied with this affair. It admits the principle that any refractory potentate can embroil his sovereign with foreign powers, and enforce his own illegitimate demands, by seizing foreign hostages.

The colonization of New Caledonia with *récidivistes*, who were left at liberty to escape to Australia, formed the subject of representation to the French Government in 1883.<sup>2</sup> 247 such criminals had found their way to Australia in the decade 1873-83. Mr. Ferry thought the agitation in Australia was really due to the fact that the inhabitants wanted New Caledonia for themselves ; and he plainly said so.<sup>3</sup> He " could not admit that any foreign country had a right to prevent France from sending convicts to one of her own colonies." Lord Lyons said that—" as a rule every one had a right to do what he liked with his own house, but it was surely reasonable for a friend who lived next door to ask him not to create his house a danger to his neighbours." But Ferry repeated<sup>4</sup> that the French Government could not abdicate its freedom of action with regard to a French colony.

At the time, Mr. Ferry was continuing a lively career at the French Foreign Office. Tunis was not enough for him : France was dragged at his heels through Madagascar and China, and into Tonquin. These events need no very detailed mention. But it will be of interest to remark that the French complaints against the Hovas were<sup>5</sup> :—

1. The refusal to carry out the Treaty of 1868 conceding to French subjects the right of acquiring land.

<sup>1</sup> 75 S.P. 1163.

<sup>2</sup> 76 S.P. 392, 401, Lyons to Ferry, 20 Dec. 1883.

<sup>3</sup> *Ib.* 404, Lyons to Granville, 9 Jan. 1884.

<sup>4</sup> *Ib.* 413, Same to Same, 18 March 1885.

<sup>5</sup> 75 S.P. 156.



2. The encroachment on the north-west coast, which was asserted to be under a French protectorate.

As in Tunis, so here, the complaint was feeble. The Treaty of 1868 provided merely (Art. 4) <sup>1</sup> that the French, on the footing of the most favoured nation, might, conforming to the local laws and regulations, establish themselves in whatever localities they might find it convenient, might take leases, acquire every kind of movable and immovable property, and carry on all kinds of commercial operations not obnoxious to the law of the land. The local law prohibited the absolute alienation of land to foreigners, and allowed twenty-five-year leases only. Did the treaty make it incumbent on the Hovas to alter it? On a strict grammatical construction, perhaps it did. The difference between the French and the Hovas was ultimately narrowed down to that which subsists between a seventy-five-year lease and a twenty-five-year lease renewable twice, but the French, who behaved with much abruptness throughout, broke off negotiations and went to war for this miserable difference. When we heard Frenchmen expatiate, nine years ago, on the wrongs of the Transvaal, it did not, perhaps, occur to us to remind them that we were their docile pupils.

An English missionary, Mr. Shaw, was arrested at Tamatave on suspicion of correspondence with the Hova enemy, and detained for seven weeks. His complicity in any such acts was disproved, and the French Government handsomely allowed him £1000, which they really need not have done.<sup>2</sup>

A protectorate supervened<sup>3</sup> under which Madagascar resigned the conduct of external relations, and French subjects were entitled to reside, travel and trade freely. They might take unlimited leases (descendible to heirs), and employ Malagasy servants. Further than that, their landed establishments could not be entered by the Malagasy authorities—they thus became little *enclaves*

<sup>1</sup> 58 S.P. 191.

<sup>2</sup> 75 S.P. 185.

<sup>3</sup> 76 S.P. 477.

of France. "Ce traité," said the French Minister<sup>1</sup> in London, "ne change en rien aux traités actuellement existants entre le gouvernement Hova et les autres états": and in 1890, France expressly agreed that the protectorate should not affect the rights of British subjects.

In 1895 the protectorate was replaced by conquest. The French maintained that this put an end to all foreign treaties. Lord Salisbury argued that as the Queen was still allowed nominally to administer the internal affairs of the country (though henceforward even they were to be controlled by the Resident), Madagascar must still be supposed to exist as a state and to be subject to its obligations.<sup>2</sup> Some complaint was made of the summary proceedings of French military governors towards British subjects,<sup>3</sup> but these seem to have been justified by the disturbed state of affairs.

However, if treaty rights had gone, there remained the ordinary rights of Britons under the general law of nations. How narrow these are became at once apparent. The French Lieutenant-Governor of Mananjary was alleged to have informed the merchants that they would be imprisoned if they bought or sold to or from any but the French traders.<sup>4</sup> In any event, French goods were officially and pressingly pushed.<sup>5</sup> The general settlement of affairs with France, which was arrived at in 1904, put an end to all further reclamations on the subject.

The Franco-Chinese adventure caused the Foreign Office of China to put forward a statement that they would not be responsible for disturbance to trade caused by French hostile action.<sup>6</sup> This is clearly justified. But Sir H. Parkes took occasion to observe that it could not cover riots among the Chinese which might be said to be provoked by the French aggression.

Salvationists were expelled from Geneva and Neufchâtel

<sup>1</sup> 89 S.P. 1050.

<sup>2</sup> *Ib.* 1054 *et seq.*; 90 *ib.* 475.

<sup>3</sup> 90 S.P. 1079.

<sup>4</sup> *Ib.* 457.

<sup>5</sup> *Ib.* 479.

<sup>6</sup> 75 S.P. 974.

in 1884, on account of the disorders which accompanied their presence, and the Federal Council sustained their expulsion. Two of them were British subjects, but Sir Julian Pauncefoot wrote<sup>1</sup>: "Under the Treaty British subjects have unquestionably the right to reside in Switzerland, so long as they observe the laws of the country. But they have no greater rights than Swiss subjects possess." The matter was one for the Swiss courts. . . . "If any British subjects should repeat in Switzerland acts which the tribunals of that country have held to be illegal, it will be impossible for H.M. Government to protect them from the risk they would incur by so doing." And, on the Canton of Berne issuing a decree interdicting the foreign propaganda as an irreligious mummary, Lord Granville wrote to the Minister to the Swiss Confederation<sup>2</sup>: "This matter is not one in which H.M. Government would be justified in taking any action. The decree of the Government of Berne is a general one, affecting Swiss citizens as well as foreigners, and it appears to H.M. Government that it is one which it may well be within the competence of a Government to make for the purpose of regulating its internal affairs."

A complaint was made in 1883 to Venezuela that the British schooners *Josephine*, *Henrietta* and *Spring Bird* had been seized and their crews imprisoned.

The lighter *Josephine*<sup>3</sup> was seized on 11 May 1883. The crew and cargo-owner were incarcerated for six weeks. Five woodcutters on board were released earlier. The local court found the charge of smuggling proven: this was reversed by the Appellate Court, but the Federal Court, before which the constitution directed that cases should come as to which the lower courts were not agreed, directed a new trial. Meanwhile the vessel had sunk at her moorings—it was alleged, through negligence. The *Henrietta*, seized on 12 May, was released on \$3000

<sup>1</sup> 75 S.P. 1042.

<sup>2</sup> *Ib.* 1047, 25 Sept. 1884.

<sup>3</sup> 77 S.P. 1202, Mansfield to Granville, 7 Jan. 1884.

bail, but again seized (in June) on subsequently coming within the jurisdiction. The master and crew were then imprisoned until November, but afterwards released; and so was the vessel, as an act of grace,<sup>1</sup> though she had as a matter of fact sunk as well.<sup>2</sup> The *Spring Bird* was seized on 12 May, her master and crew being imprisoned, and she was condemned, no appeal being interjected.<sup>1</sup>

Then the owner of the *Josephine* claimed, through the British Government, \$10,719; and the owner of the *Henrietta*, \$22,091.40. A schedule sets out, in the former case, the particulars.

	Dollars
David (master ?) for false imprisonment, ill treatment and loss of situation (42 days); wages also	1680.0
Ditto for Michael, Hersham, Baxter, Keens, and Davis, for similar imprisonment and ill-treatment, losses, etc.	75.0
Montout (cargo-owner ?) for false imprisonment, losses, ill-treatment, etc. . . . .	575.0
Watley, Felix, Charles, Fareira, St. Hill, for false imprisonment (11 days), ill-treatment, starvation, etc. (carpenters and woodcutters' daily wages \$2): wages also	125.0
<i>Josephine</i> and boat . . . . .	69.0
Demurrage, 100 days at \$10 . . . . .	3000.0
8 bags starch . . . . .	1000.0
Loss of contents and freights, and value of hardwood discharged . . . . .	20.0
Sum claimed by owner of boat hired to assist ship, and seized by authorities . . . . .	2000.0
Joseph Montout, for 1200 c. ft. wood . . . . .	250.0
Joseph Montout, tent, tools, clothing . . . . .	960.0
	400.0
	<hr/> 10,719.0

Such a detailed assessment of sufferings is not often to be met with. The bill was a good deal cut down by the British; e.g. David wanted \$2500, the five seamen

<sup>1</sup> 77 S.P. 1205.

<sup>2</sup> *Ib.* 1207.

\$1000, Montout \$1000 and \$1600 for wood, whilst the *Josephine* and her tackle were valued at \$4500, and demurrage at \$20 instead of \$10.

The case of the *Spring Bird* was abandoned. As to the other two, Venezuela referred Great Britain to the courts. This seems entirely proper. The seizure of the ship and imprisonment of the crews were recognized steps in procedure. The Law Officers advised the British Government that, whilst it was "not an easy matter to determine in what cases British subjects should be left to their remedy against the government of any country in the courts of that country," yet, "when the action of the officials of any country has been arbitrary and unjust, and there appears to be adequate ground for believing that no sufficient remedy would be afforded by proceedings before the tribunals, diplomatic intervention is justifiable." Salisbury thought that this was such a case<sup>1</sup>; but, inconsistently, he reserved action until the decision of the Venezuelan court should be known. Since no legal proceedings seemed to have been taken against the *Henrietta*, he asked for compensation in that case at once. The correspondence dragged on until 1886: Venezuela justifying the delay on the ground of the *Josephine's* master having absconded.<sup>2</sup>

The delay of three years since the decision of the full court in 1883 that there should be a new trial, was considered by Iddesleigh as sufficient ground for concluding<sup>3</sup> there had been a denial of justice in the case of the *Josephine*. In that of the *Henrietta*, there had been no legal proceedings at all. The flat *L'Envieuse* was next detained, and her master imprisoned for three months<sup>4</sup> on a charge of anchoring at a port which was not a port of entry. The finding of the Venezuelan court was impugned, and a fresh claim for compensation

<sup>1</sup> 77 S.P. 1212, Salisbury to St. John, 21 Aug. 1885.

<sup>2</sup> *Ib.* 1225, Gonzalez to St. John, 27 May 1886.

<sup>3</sup> 79 S.P. 45.

<sup>4</sup> *Ib.* 56.

made: though it is clear that there was at any rate some doubt as to the facts.<sup>1</sup>

Salisbury in 1887 asked for a settlement within seven days; and it was accorded under protest.<sup>2</sup> It is not very easy to appreciate the grounds of this sudden action. An attempt might have been made to remove the hitch in procedure which delayed the *Josephine* case. That the courts were impartial enough was shown by the fact that the Appellate Court had given a decision in favour of the *Josephine*. The case cannot but be regarded as an infringement of the principle of judicial independence.

In 1885 the British Chargé d'Affaires was assaulted by a policeman at Athens. This naturally belongs rather to the class of invasions of diplomatic immunities; still, it may be briefly adverted to. Mr. Nicolson, the officer in question, was admittedly endeavouring to proceed by a forbidden path at Mt. Lycabettos. The policeman struck him to make him retire (being unable to make him desist), and this he was prepared to excuse. But he was followed and struck again, and finally driven off with stones. Regrets were expressed by the Greek authorities in person, and the policeman was dismissed and awarded two months' arrest.<sup>3</sup>

Burmah negotiated a commercial treaty with France in 1885, to the great alarm of Lord Salisbury, who declared that he could not acquiesce in the transfer to any non-British authority of control over the Burmese revenue or royal prerogatives. This was on the ground that Burmah was what he styled a "dependent" state. How it had become so, Lord Salisbury does not indicate. It could hardly be because he chose to attach that denomination to it.<sup>4</sup> When Lord Granville, the same year, had asserted similar claims over Zanzibar, Germany,

<sup>1</sup> 79 S.P. 57, Jackson to Robinson, 26 Aug. 1887.

<sup>2</sup> *Ib.* 63.

<sup>3</sup> 76 S.P. 879.

<sup>4</sup> See 77 S.P. 155, Salisbury to Walsham, 9 Sept. 1885.

admitting the beneficent influence of Britain, "did not understand that the independence of the Sultanate of Zanzibar was thereby questioned."<sup>1</sup> The Italian Duchies were always presumed independent, in spite of their partial identification with Austria.

On the union of Bulgaria and Eastern Rumelia, Lord Salisbury wrote affirming the perfect right of the Sultan to take military measures for restoring the *status quo*.<sup>2</sup> Whatever opinion they might have entertained as to the prudence of the proceedings, none of the signatory powers would have been entitled to take exception to them on grounds of international law.

During the course of the fishery disputes between British North America and the United States, the position was ameliorated by a *modus vivendi*, which was in 1885 terminated by the United States. The Canadian authorities then, under their Bait Acts, arrested various United States ships—notably the *D. J. Adams*. In the case of that vessel, infringement of a customs regulation was alleged, as to which Mr. Phelps says:—"Can it be reasonably insisted that by the sudden adoption, without notice, of a new rule, a vessel of a friendly nation should be seized and forfeited for doing what all similar vessels had for so long a period been allowed to do without question?" Lord Rosebery referred the States to the Canadian courts; but Mr. Phelps observed that the courts were bound by the law, which might be contrary to the treaty, that the United States had no *locus standi* in court, and could not be expected to await the result of prolonged litigation by other people. Lord Iddesleigh, quoting Mr. Fish, thought, on the contrary, that until the courts had spoken, discussions would be premature.<sup>4</sup>

<sup>1</sup> See 77 S.P. 1100, Münster to Granville, 6 Feb. 1885.

<sup>2</sup> 76 S.P. 1282, Salisbury to White, 2 Nov. 1885.

<sup>3</sup> 77 S.P. 538, Phelps to Rosebery, 2 June 1886.

<sup>4</sup> 77 S.P. 582, Iddesleigh to Phelps, 30 Nov. 1886.

"It is the duty of the owners of the vessels to defend their interests before the courts at their own expense, and without special assistance from the Government at this stage. It is for those tribunals to construe the statutes under which they act. If the construction they adopt shall appear to be in contravention of our treaties with Great Britain, or to be (which cannot be anticipated) plainly erroneous in a case admitting of no reasonable doubt, it will then become the duty of the Government to avail itself of all necessary means for obtaining redress."<sup>1</sup>

It will be seen in what respect these cases in Venezuela and Canada differed from that of the *Bosphore Egyptien*. In the former class of cases, the seizure was a mere step in legal process. In the latter, it was a purely executive act, of which it rested with the aggrieved parties to complain.

The *Marion Grimes*<sup>2</sup> was detained in Oct. 1886, and for the hauling down of the flag due regret was expressed.

"It is true," says Phelps, writing in 1887, "beyond question, that when a vessel is seized for an alleged infraction of the laws of the country, and the fact of the infraction, or the exact legal construction of the local statute said to be transgressed is in dispute, and is in process of determination by the proper tribunal, the government to which the vessel belongs will not usually interfere in advance of such determination, and before acquiring the information on which it depends; and especially when it is not yet informed whether the conduct of the officer making the seizure will not be repudiated by the government under which he acts." . . . This, he observes, is all that Mr. Fish meant. In the present case, the facts were not in dispute. The vessels were seized for facts which they admitted, and all that arose was the pure question of law, as to which the States

<sup>1</sup> Fish to Dart, *U.S. Dipl. Corr.* (1870), 431.

<sup>2</sup> 78 S.P. 541.



held one view and Canada another. There was no need to await the decision of the tribunal—which could be only one way.

Phelps went on to complain<sup>1</sup> of the sudden rigour with which the harbour and revenue laws had been put in force. “No vessel could sail in safety without carrying a solicitor,” if this were to go on. According to Lord Salisbury, nothing unusual had been done.

German claims for lands in Fiji were allowed at £10,620 in 1885,<sup>2</sup> and British claims for lands and easements in Angra Pequena were allowed in 1886.<sup>3</sup>

In 1886, the brigantine *Maggie*, duly quarantined at Fayal, proceeded to Terceira, but was ordered back to Lisbon, at an expense of £100, to perform fresh quarantine. Portuguese law conferring the widest discretion on local authorities in this matter, Lord Rosebery dropped with regret the claims for compensation.<sup>4</sup>

It is not useless to recall the circumstances under which Russia in 1886 repudiated the clause of the Treaty of Berlin under which the Emperor declared his willingness that Batoum should be a free port. The curious ground was taken, that this was a mere spontaneous declaration, and not binding. Rosebery had no difficulty in repelling the contention.<sup>5</sup>

The Samoan question of 1885–8 is another instance of the rapid acquisition of influence by foreigners, as in Egypt and Tunis, in an altogether abnormal region. It need not be the subject of prolonged comment. The British Commissioner (Thurston)<sup>6</sup> concurred with his German colleague that the unsettled state of affairs in Samoa was incompatible with the maintenance of peace and order, and that there was no hope of early improvement. Joint action had proved ineffective, and a protectorate was

<sup>1</sup> 78 S.P. 543, Phelps to Salisbury, 26 Jan. 1887.

<sup>2</sup> 76 S.P. 887.      <sup>3</sup> 77 S.P. 1042.      <sup>4</sup> *Ib.* 825.

<sup>5</sup> *Ib.* 833, Rosebery to Morier, 13 July 1886.

<sup>6</sup> 79 S.P. 963, Thurston to Granville, 29 April 1885.

recommended, to be undertaken by one power, on terms to be arranged by Great Britain, Germany and the United States of America. The existing bad situation was attributed to the equipoise maintained between contending factions by foreign assistance. It was aggravated by the German Treaty of 1884<sup>1</sup> giving Germany a voice in almost all Samoan legislation. By implication, Britain and the States were entitled to a like voice. "That three such Councils would exist long without friction it is impossible to conceive ; and, moreover, the creation of even one such Council cannot, whatever may be intended, be otherwise than destructive of a native government the independence of which has been expressly and frequently recognized."<sup>2</sup>

Germany then invaded the islands with an armed force,<sup>3</sup> while a joint Commission was actually sitting. The pretext was "thefts and robberies committed on German plantations and systematic denial of legal protection,"<sup>4</sup> contrary, of course, to treaty : also an alleged insult to the German Emperor. Becker, the Consul, presented a demand for \$13,000 and an "abject" apology on 23 Aug., and invaded the country on the 24th, remarking quaintly—

"Your Majesty, you do not obey the word of the German Government which I said to you in my letter of yesterday. . . . Therefore . . . war is about to be made upon you."<sup>5</sup> The Germans then set up a rival "king," and began to administer the government. Claims were thereupon made by a London firm, Messrs. McArthur & Co. One related to the confiscation of a house. This Germany justified as a war right : and they put forward strong grounds for considering the building public property.<sup>6</sup> A far more important matter was the virtua

<sup>1</sup> 75 S.P. 508.

<sup>2</sup> 79 S.P. 969, Thurston to Granville, 29 April 1885.

<sup>3</sup> *Ib.* 1001.

<sup>4</sup> *Ib.* 997, Bismark to Hatzfeldt, 7 Aug. 1887.

<sup>5</sup> 79 S.P. 1003.

<sup>6</sup> *Ib.* 1042.

securing of a monopoly to German traders, by the enactment of an extraordinary law prohibiting Samoans from paying new debts until they had paid their heavy taxes.<sup>1</sup> The cash for taxes had to be raised by mortgage to traders, mainly German, and until the mortgage was paid off, the tax-payer could enter into no business relations with others.<sup>1</sup> Not only so, but the mortgage was communal, and a person who had paid his own taxes found himself in jail because of selling three pounds of copra to McArthur's. Salisbury wrote—"H.M. Government cannot but disapprove of the system as wrong in principle and unjust in its effects, and they desire to protest most strongly against the action of the *de facto* government [*i.e.* Germany] against Leanga, which they regard as unnecessarily harsh and illegal, as injurious to the house of McArthur & Co., and most prejudicial to the interests of British traders in Samoa."

Mataafa was then chosen King by the anti-German party.

Gathering strength, he on 18 Dec. 1889 annihilated the German post which had been stationed to protect the German plantations which, Bismark explained, were endangered—"by the fighting between the native parties."<sup>2</sup> Bismark's *façon de parler* was unfortunate: on 17 Dec. his master's gun-vessel *Eber* had shelled Mataafa's head-quarters.<sup>3</sup> On the fateful 18th, the *Olga* and she had landed 200 men to attack Mataafa on land: and they were repulsed with a loss of 18 killed and 36 wounded. In these circumstances Germany proposed a joint conference. Meanwhile, the situation became acute. The U.S. President<sup>4</sup> observed in his Message of 15 Jan. 1889, that German "propositions on this subject seem to lead to such a preponderance of German power in Samoa

<sup>1</sup> 79 S.P. 1030, Salisbury to Scott, 10 Aug. 1888.

<sup>2</sup> 81 S.P. 579, Bismark to Hatzfeldt, 13 Jan. 1889.

<sup>3</sup> *Ib.* 583, de Coëtlogon to Salisbury, 3 Jan. 1889.

<sup>4</sup> Cleveland.

as . . . is inconsistent with every prior agreement or understanding." The German Consul (subsequently handsomely disavowed <sup>1</sup>) declared war, and refused to admit foreigners to any exemption from its effects. The *Adler* took British subjects out of the *Richmond*: but the sloop *Royalist* obtained their surrender.<sup>2</sup> The Conference, however, was duly held, and resulted in a complete pacification,<sup>3</sup> Malietoa being restored and the independence and neutrality of Samoa recognized by the three powers, who further endowed the country with a court nominated by the King of Sweden and a system of land-law elaborated by themselves. They also framed a tariff for their protégé: they retained supervision over taxation; and in fact they deprived Samoa of any fraction of independence. It was declared that the subjects of the three powers were entitled to equal rights of "residence, trade and personal protection."

Malietoa formally assented to the régime thus established.<sup>4</sup> But it did not work. The King wanted dynamite fishing prohibited, and also cricket—because if this game were not forbidden "nobody would think of doing useful work." His ordinances were not very promptly obeyed, and when the Swedish Chief Justice arrived, that functionary found himself in no better case. Mataafa was constantly in the background. In short, the Joint Act had provided machinery where men were what were needed. Its Land Commission claimed to be independent of its Supreme Court.<sup>5</sup> It was impossible to execute process in some districts. The treasury was empty. The three powers had to intervene again and capture Mataafa, and by a strange whirl of fortune, Tamasese, the ex-German king, took his place as arch-rebel.

On the decease of Malietoa in 1898, a king had to be elected, and the claims of two elected candidates were

<sup>1</sup> 81 S.P. 594, H. Bismark to Malet, 22 Febr. 1889.

<sup>2</sup> *Ib.* 591.

<sup>3</sup> *Ib.* 1058; 82 *ib.* 617.

<sup>4</sup> 85 S.P. 884.

<sup>5</sup> *Ibid.* 961 *et seq.*

solemnly argued by counsel before the Chief Justice. He decided against Mataafa and for Malietoa's son (Tamasese's candidate): fighting followed, and the Chief Justice and his protégé fled to H.M.S. *Porpoise*. Landing-parties were involved in the struggle and sailors were killed. The three powers pulled down their flimsy constitution, and sent out a Sovereign Commission. The kingship was abolished, and ultimately the powers divided the islands between them: a previous attempt to govern through one neutral Administration having failed.<sup>1</sup>

It is hardly needful to record the means whereby, in 1886, the territory of Ja Ja (West Africa) was virtually incorporated in the British dominions. The quarrel with Ja Ja began in a clear infraction of treaty—traders being authorized by the British Consul to proceed up the Opobo River to points which were forbidden by the agreement of 4 Jan. 1883, on the flimsy excuse that the prohibition had been imposed in their own interest (on mistaken ideas of hygiene).<sup>2</sup> A more decent veil was cast over the transaction by Lord Rosebery, who declared that the exaction of customs by Ja Ja, contrary to treaty, dissolved the whole agreement and deprived him of any rights under it.<sup>3</sup> Since, however, the position of Ja Ja was entirely that of a subject, liable to the jurisdiction of the British Consul, and not that of an independent ruler, the matter is of little interest or importance. How he had drifted into that position is, on the other hand, of very great importance. The Treaty of 1873<sup>4</sup> acknowledged him as King of Opobo, "and entitled to every consideration as such." The Treaty of 1884<sup>5</sup> barred him from foreign relations, and

<sup>1</sup> See 92 S.P. 136 *et passim*.

See also for an excellent short history of Samoan affairs the Report of Mr. Gresham to the U.S. President, 9 May 1894 (86 S.P. 1209). He agrees that the Berlin Act was "in substance and in form a tripartite foreign government."

<sup>2</sup> 78 S.P. 1212, Hewett to Rosebery, 19 April 1886.

<sup>3</sup> *Ib.* 1217.

<sup>4</sup> 65 S.P. 1184.

<sup>5</sup> 17 Hertslet, 198.

referred disputes between him and his chiefs, or foreign traders, or neighbouring tribes, to the British Consul; it also bound him to act on that officer's advice "in the general progress of civilization." After this, we find the Consul fining the King, and generally treating him as a subject, and we can hardly wonder at it after so complete a surrender. And the claim to try him and condemn him "as a common malefactor" "to degrading punishment," as Sir H. H. Johnstone threatened, does not startle us. He had ceased to be "entitled to every consideration" as a Ruler; and had become a subject-vassal.

After the Brito-German treaty regarding the East African territories of the Sultan of Zanzibar, Portugal made a claim against that ruler for a recognition of her right to certain territory. On the ground of the extensive commercial relations of India with Zanzibar, and of the agreement partitioning the Sultan's dominions between Britain and Germany, Lord Salisbury chose to consider himself aggrieved, and put pressure on Portugal to suspend hostilities which had been commenced.

Meanwhile, imitating the French in Madagascar, the Portuguese had bombarded Minengani at twelve hours' notice, with the corvette *Afonso d'Albuquerque* and gunboat *Douro*. The ss. *Kilwa* was also seized.

Portugal agreed to restore the *Kilwa*, and to accept a joint Delimitation Commission. Her claim had been recognized by Britain in 1817, and her flag had flown as far as Cape Delgado up to 1854. But since then, she had not effectively occupied the district. Thirty-two years' absence were probably enough to bar her claim; and Zanzibar had actually been in the habit of levying duties in the locality.<sup>1</sup> Salisbury very fairly made it clear that Zanzibar could not rely on the Brito-German agreement in itself, but only on the actual occupation which the commissioners who negotiated it had established to exist.

<sup>1</sup> 78 S.P. 1293, Salisbury to Petre, 7 Nov. 1887.

With regard to the bombardment of Minengani, Mr. Petre was directed by Lord Salisbury to admit that—"notification was given to the British subjects of the intention to bombard, and that, according to the rigid interpretation of International Law, H.M. Government cannot advance their case as a matter of absolute claim"<sup>1</sup>:—but to represent the hardship and to ask for indemnity. This request was refused.<sup>2</sup>

In Hayti, Clouchet, a Frenchman, a citizen of the U.S.A., and two British subjects, Coles and Crosswell, were arrested in March 1885 for alleged theft of cheques from the National Bank. The matter arose out of business disputes, and Coles alleged that the Government of Hayti was determined to convict him, and that the courts would do so whether justly or not.<sup>3</sup> The commendable instructions given by Freycinet in regard to the French prisoner were "to obtain all the indulgence that the local law permits," but "not to interfere with the process of law unless there be a clear denial or delay of justice."<sup>4</sup>

Mr. Crosswell<sup>5</sup> alleged several irregularities in the procedure against himself. More important was the allegation that the jury was to be packed with government clerks. However, the jury discharged all the accused. It was sent back to consider its decision, and then convicted Coles and Clouchet. They were sentenced to three years' imprisonment and to restitution, and appealed. The British and French Consuls addressed a long remonstrance to the government, sustaining that the conviction was the outcome of threats and bribes, according to the testimony of the jury's own foreman. Hayti replied that the matter was in the hands of the appellate tribunal—which at the close of Dec. 1885 rejected the cassation.<sup>6</sup>

<sup>1</sup> 79 S.P. 331, Petre to Gomez, 25 June 1888.

<sup>2</sup> *Ib.* 371.

<sup>3</sup> 78 S.P. 1304.

<sup>4</sup> *Ib.* 1305, Salisbury to Walsham, 11 Aug. 1885.

<sup>5</sup> 78 S.P. 1308.

<sup>6</sup> *Ib.* 1319.

A Special Commissioner (Sir C. Lloyd Hill) was then sent out by Lord Rosebery to Hayti. He was instructed to urge that :—

(1) Coles was not confronted with the witnesses as required by the local law.

(2) Production had been refused of a letter written by a Paris official of the Bank, declaring that the cheques could only have disappeared at the Ministry of Finance.

(3) The Public Prosecutor had been prosecuted for tampering with the jury.<sup>1</sup>

It is difficult to see how the demand for discovery (2) could be insisted on. Every country has its own rules of evidence. Some of our own might be regarded abroad as very singular. Yet we should not expect to find the Russian Government asking us to pardon a Russian convict because hearsay evidence which would have been nearly conclusive in his favour was not admitted. The other complaints (1) and (3) seem fair grounds for interference: and Sir L. Hill was successful (with a corvette at hand) in obtaining the release of Coles, without resorting to an ultimatum.<sup>2</sup> Clouchet's enlargement was obtained as an act of favour.<sup>3</sup>

Crosswell wanted £20,000 compensation for his 186 days' preliminary detention, and Lord Iddesleigh thought that it was a case in which one "might fairly question the good faith of the prosecutors," there being no reasonable ground of trial. He observes that Haytian law did not authorize Crosswell's arrest or detention; and (inconsistently) that he ought to have been released after "the first judgment of the Court of Cassation"—(which never seems to have had anything to do with his case). Lord Iddesleigh does not therefore appear to have studied the affair very minutely—nevertheless he pressed for an indemnity. Coles also wanted money: but Sir L. Hill told him that the government had obtained his release,

<sup>1</sup> 78 SP. 1327.

<sup>2</sup> *Ib.* 1334, Hill to Rosebery, 5 July 1886.

<sup>3</sup> *Ib.* 1333.



"not because they considered him innocent, but because his trial was manifestly unfair." He assessed his damage at £35,000.<sup>1</sup> The correspondence was laid before the Law Officers, and here Lord Iddesleigh declined to interfere.<sup>2</sup>

"The grounds of the interference of H.M. Government," writes Sir Julian Pauncefoot to Mr. Coles,<sup>3</sup> "were that, after the first verdict had been given, the jury were tampered with, and returned a corrupt verdict, which was accepted by the court as superseding the first one."

Hayti repudiated all responsibility for damages in Crosswell's case, because—"son arrestation et sa détention ont eu lieu en conformité de la loi haïtienne." "Britain was prepared to accept £500, and Hayti was willing to pay £600 as a free gift"—but Mr. Crosswell apparently declined these offers.

It will be observed that, alike in these cases and in the Venezuelan shipping cases above mentioned, there were serious flaws in procedure which gave the foreign power an opening of which it could take advantage. The Venezuelan court delayed to proceed for quite three years after the order for a new trial, and nearly six years after the original seizure. The Haytian trial had admittedly been accompanied by grave suggestions of irregularity.

The U.S. citizen—d'Almena<sup>4</sup>—claimed £200 per day for his incarceration of 283 days pending appeals. A Mr. van Bokkelen, detained on account of debt for a year without trial,<sup>5</sup> wanted over £20,000. It is doubtful whether his detention was contrary to treaty: a Haytian would have been allowed a *cessio bonorum*, but the treaty<sup>6</sup> only stipulates for protection to purse and person, and does not confer equality. Hayti contended that the treaty only conferred the enjoyment of rights everywhere

<sup>1</sup> 78 S.P. 1338, 1339.

<sup>2</sup> *Ib.* 1340.

<sup>3</sup> *Ib.* 1345, 11 Jan. 1887.

<sup>4</sup> *Ib.* 1351, St. Victor to Hill, 5 April 1887.

<sup>5</sup> *Ib.* 1353.

<sup>6</sup> *Dipl. Corr. U.S.* (1885), 545.

<sup>7</sup> *Ib.*

<sup>8</sup> Of 3 Nov. 1864: see *ib.* 499, 508.

recognized, and not of peculiar rights special to the local system. There seems to be much reason in the contention.<sup>1</sup> Mr. Bayard in his reply contends that imprisonment for debt is *contra bonos mores*—which may be matched with his ingenuous plea for the fur-seal. The other American contention reads “on an absolute equality with citizens” into the treaty. It makes it a concession of equality and not of justice. If it had meant that, it would have said so.<sup>2</sup> The prisoner was spontaneously released after fifteen months; and Mr. Bayard judged it wise not to press for indemnity, as he might be confronted with the claims of U.S. creditors prejudiced by his release!<sup>3</sup> Eventually the matter was arbitrated<sup>4</sup> by a U.S. lawyer, who in a diffuse award awarded the claimant’s representatives £12,000. The U.S. representative has put it on record that—“the court, in listening to the discussion of the law and facts of these cases, with constant attention and patience, demeaned itself with becoming dignity.”<sup>5</sup>

A case which appears to be almost exactly parallel is that in which Prussia refused protection to the inventions of foreigners, just as Hayti refused them the *cessio bonorum*. “Questions concerning the property in inventions,” said Mr. Cadwalader, “are dependent upon the law of the particular country where the protection is claimed, or the supposed injury committed. If those laws afford no protection in such cases, it is not competent for this Government, by a diplomatic demand, to . . . procure either protection for an American inventor or compensation for his invention.”<sup>6</sup> Patents are not *juris gentium*.

<sup>1</sup> *Dipl. Corr. U.S.* (1885), 499.

<sup>2</sup> *Ib.* 509, 517.

<sup>3</sup> *Ib.* 529.

<sup>4</sup> *Ib.* (1888), 987, 1008.

<sup>5</sup> *Ib.* (1885), 528, Langston to Bayard, 24 June 1885.

<sup>6</sup> Moore, *Digest*, VI. § 1006 (Cadwalader to Broadwell, 2<sup>d</sup> July 1875).

Compensation (£500) was granted in respect of an Austrian ship, wrecked and plundered in Ireland, when for a technical reason a prosecution fell through.<sup>1</sup> But this was done to bolster up similar claims on Greece.

The interference of Russia in Bulgaria, which made Prince Alexander's tenure of the throne impossible, was frankly illegal. The Prince's aide-de-camp, Corvin, arrested by the conspirators, claimed the protection of German nationality.<sup>2</sup> Russia subsequently demanded the release of the conspirators who had seized the Prince, the postponement of the National Assembly, and the raising of the "state of siege" established by the provisional administration. General Kaulbars did not think this was an interference in internal affairs "as he had not made any demand for a change in the government."<sup>3</sup> Lord Iddesleigh remonstrated with Mr. de Staal—but the latter characterized the demands as mere advice.<sup>4</sup> Kaulbars, however, continued to press that his "advice" should be taken; and the Bulgarian Government promised to do what the law permitted. Kaulbars admitted to Lascelles that on all these points "the Emperor had made up his mind, and the Bulgarians must agree to them."<sup>5</sup> Iddesleigh protested against this as an affront not only to Bulgaria, but to the other Treaty Powers.

The state of siege was soon raised: the conspirators were constitutionally released. But the Assembly was duly convoked, as without it the provisional government felt itself in an irregular position. Russia then fell back on complaints that Russian subjects and agents had been ill-treated. She even complained of the ill-treatment of Russian sympathizers—which was to go too far.

<sup>1</sup> III *Hansard* (1850), 717.

<sup>2</sup> 78 S.P. 853.

<sup>3</sup> *Ib.* 868.

<sup>4</sup> *Ib.* 87, Iddesleigh to Morier, 29 Sept. 1886; 874, Same to Same, 5 Oct. 1886.

<sup>5</sup> *Ib.* 877, Lascelles to Iddesleigh, 3 Oct. 1886.

Finally, on the election of Ferdinand, she, in the face of European suspicion, "washed her hands of the whole affair."

That attitude was not maintained for long. In 1888 she re-opened the discussion. Ignoring her own illegalities, she took the unexceptionable ground that the new state of affairs in Bulgaria was not in accordance with the Treaty of Berlin. She demanded <sup>1</sup> a Turkish declaration of its illegality, the supersession of Ferdinand, and a deputation to the Czar of Russia to express "the dutiful sentiments" of the parliament. Great Britain and Austria threw cold water on the scheme,<sup>2</sup> though Germany approved it. The government of the Prince—however illegal—gave to the Bulgarians Lord Salisbury's fetishes—peace and good order.<sup>3</sup> He was not inclined to disturb it. De Staal pointed out that, nevertheless, it constituted, in its illegality, "a festering sore where gangrene might set in, and create imminent danger."<sup>4</sup>

Turkey was induced to inform Prince Ferdinand that his government was illegal; nothing came of it.

In 1881 a Wesleyan missionary named John Jones, residing in one of the Loyalty Islands, was the subject of representations by the French, who wished him to be recalled.<sup>5</sup> Lord Granville, after investigating his career, declined to influence Mr. Jones' employers, the London Missionary Society, in that sense. . On the contrary, he complained of the attitude towards him of the French colonial authorities. The difficulty seems to have arisen from the avowed determination of the French<sup>6</sup> to control religious teaching in their oceanic possessions.

<sup>1</sup> 79 S.P. 445. Paget to Salisbury, 20 Febr. 1888, *et passim*.

<sup>2</sup> *Ib.* 446, Salisbury to Paget, 21 Febr. 1888.

<sup>3</sup> *Ib.* 456, Salisbury to Morier, 26 Febr. 1888.

<sup>4</sup> *Ib.* 459, Morier to Salisbury, 22 Febr. 1888.

<sup>5</sup> *Ib.* 101.

<sup>6</sup> *Ib.* 104, de Freycinet to Lyons, 15 April 1886.

“ A Maré, le Résident a dû, dans l'intérêt de la tranquillité du pays, et conformément aux instructions, investir un pasteur français du pouvoir de régler les affaires se rattachant aux questions religieuses qui ont toujours, dans cette région,<sup>1</sup> vivement passionné les esprits ; ce pasteur a, notamment, le droit exclusif de présenter les instituteurs [“ teachers ”] à l'investiture administrative.”

Mr. Jones was expelled from Maré at half-an-hour's notice on 10 Dec. 1887.<sup>2</sup> Lord Salisbury inquired what harm he had really done : but Mr. Goblet replied that the New Caledonian government were better informed than any one else could be upon the subject, and that they regarded him as a dangerous person. Britain had several times expelled such people : why should not France ?<sup>3</sup> This was not satisfactory ; for nothing would have been easier than to furnish the proofs which were presumably in the hands of the New Caledonian government. But France was not Hayti or Venezuela, and the British Minister let the matter drop. French missionaries are avowedly national political agents ; and perhaps France was naturally suspicious that Welsh missionaries might be the same.<sup>4</sup>

In 1854 and 1855,<sup>5</sup> the U.S. steamer *Ben Franklin* and barque *Catherine Augusta* were subjected to precautionary measures at St. Thomas, West Indies, the former vessel being shot at. In 1888 the dispute which arose in consequence was referred to the arbitration of Sir E. Monson. The Danish Government relied on the delay exhibited, and the intermittent manner in which the claim was pressed ; but without effect. The award *au fond* was, however, in favour of Denmark.<sup>6</sup> Sir Edmund found that the St.

<sup>1</sup> As elsewhere.

<sup>2</sup> 79 S.P. 107.

<sup>3</sup> *Ib.* 114, Goblet to Lytton, 26 July 1888.

<sup>4</sup> See the writer's *International Law in South Africa*, p. 62, for a curious quotation from Despagne on this head.

<sup>5</sup> 79 S.P. 191.

<sup>6</sup> 82 S.P. 756.

Thomas authorities had legitimate grounds for suspicion that the vessels were intending to violate the neutrality of the port. It was therefore reasonable to require caution against such violation, and to refuse to allow the discharged cargo (munitions of war) to be re-shipped without an undertaking of a similar kind. As to the firing on the *Franklin*, she had not complied with the formalities imposed on vessels leaving the port. Her temporary engagement in the service of the R.M.S.P.C., whose regular packets were exempt from such compliance, conferred on her no special immunities.

It is rather important to notice that the United States put forward the surprising allegation of an absolute right of a friendly vessel to enter and repair in any port.

Lieut. Cooper of the *Griffin* was shot while capturing a slave-ship off Zanzibar, on 17 Oct. 1888. Two seamen were injured. Their assailants escaped to Pemba and thence to the mainland. The Sultan sent a commissioner to endeavour to effect their arrest. His efforts were unsuccessful, and the British Government asked the Sultan to collect \$10,000 from the people at Pemba, who were supposed to have facilitated the escape. The Sultan paid it out of his own resources, under protest.

"Is it known to you," he pertinently inquires, "that the murderer was our subject, or that he acted by our order? Is our own complicity known to you? We tried our best to get hold of these men. Do you think we got hold of them and released them? Why have you exacted this payment? [It will form a precedent.]"

Perhaps it was with good judgment that no reply was made,<sup>1</sup> so far as can be seen.

Another Portuguese railway case occurred in 1888—this time with reference to Mozambique. An agreement by which British and American capitalists were to construct a railway from Lorenzo Marquez to Johannesburg was cancelled by Portugal, and the line confiscated.<sup>2</sup>

<sup>1</sup> 81 S.P. 178.

<sup>2</sup> *Ib.* 681.

The contract was made with a Portuguese company—but its shareholders were mostly British and American, and it entrusted the actual work to an English company. The British Government declared the Portuguese responsible to the latter: which seems at first sight a far-fetched doctrine: remoteness of damage would surely be a bar to any such claim.<sup>1</sup> It is urged by Lord Salisbury that the Portuguese Government knew that the English company was substantially taking over the work; but it is difficult to see what difference that makes.<sup>2</sup> Portugal paid, after the Berne arbitration, an indemnity.<sup>3</sup>

In 1888, permission to send some arms and ammunition, the means of self-defence, to the "African Lakes Company" through Mozambique, was granted, after great difficulty, to Britain by Portugal.<sup>4</sup>

Other difficulties occurred with Portugal in Africa in 1889. The British Vice-Consul at Quilimane endeavoured to clear some rockets for Nyassa, and was thereupon indicted criminally and taken to Mozambique.<sup>5</sup> The present Bishop Hine was deprived of his revolver and cartridges. Since the stringent restrictions on the import of arms (which were found burdensome to the Portuguese) had been imposed at the urgent request of the British Government, there was some reason for Portugal to be surprised that so much offence was taken at these incidents. These trivial matters were, however, apparently lost sight of in the important territorial disputes which supervened.

The Portuguese attempt to establish effective occupation of the Nyassa and Shiré district was foiled by Lord Salisbury, and a draft convention was signed on Aug. 20, 1890, which went so far in limiting the freedom of Portugal to control passage through, or to alienate, her undoubted possessions in East Africa, that it was

<sup>1</sup> 81 S.P. 687, Gomez to Petre, 1 July 1889.

<sup>2</sup> *Ib.* 689.

<sup>3</sup> *Dipl. Corr. U.S.* (1900), 845.

<sup>4</sup> 79 S.P. 1138 *et passim*.

<sup>5</sup> 81 S.P. 989.

impossible to get it ratified.<sup>1</sup> Meanwhile, the British steamer *James Stevenson* was seized in the River Shiré, and her crew of thirty-two (five European) imprisoned,<sup>2</sup> for previously refusing to allow search by the Portuguese customs north of the mouth of the Ruo. She was restored after six weeks.<sup>3</sup> £4,900 was claimed by the African Lakes Company, the owners, but the British Government reduced this claim to £1,500. The Portuguese action was supported on the ground that the *modus vivendi*, opening the Shiré, could not have been known at the time. Lord Salisbury took the hopeless point that the unratified Treaty of Aug. 20 was in some mysterious manner morally binding on Portugal.

The same ship was refused access to the shore and the master was arrested, on a later trip,<sup>4</sup> and orders were issued that no provisions or wood were to be supplied to any British public or private vessels. Next, the s.s. *Countess of Carnarvon* was seized (with British S.African officials on board), March, 1891, for entering the Limpopo (which, under the *modus vivendi* then current, was not an open river). Her passengers were arrested, and, for the first night, "placed in the hold with the filthy Portuguese and niggers"—in Dr. Jameson's pleasing language—but released on arrival at Delagoa Bay. On 15 April the *Agnes* and *Shark* were also seized at Beira, but all the vessels were eventually released. Whether any specific compensation was made in these four cases does not appear.

A new Treaty was concluded at Lisbon, 11 June 1891.<sup>5</sup> Sir G. Petre thinks that Portugal had then realized that the rejection of the Treaty of 20 Aug. was a mistake. But she had secured by its rejection two great principles :— (1) The substitution of reciprocal rights of pre-emption for the prohibition to Portugal to alienate ; (2) The reference

<sup>1</sup> 82 S.P. 318, 333 *et passim*.

<sup>4</sup> *Ib.* 855.

<sup>2</sup> 83 S.P. 834.

<sup>5</sup> *Ib.* 27.

<sup>3</sup> *Ib.* 842.



of questions of communication-facilities to the arbitrament of a neutral body.

Colombia, in 1889, interpreted her treaty with Britain in a curious and not very valid way.<sup>1</sup> Art. 16 of the Treaty of 1867<sup>2</sup> grants exemption to British subjects from "all contributions imposed as a compensation for personal service." Reading this in the light of Art. 14, which exempts them from all taxation in excess of native citizens, the Colombian Government held that the former exemption only applied to contributions in lieu of *military* service. A contribution of three days' work exacted by a Panama law they regarded as an ancillary alternative to the equivalent cash contribution, and not *versâ vice*. Evidently this is a strained interpretation, unless the Panama people were in strange ignorance regarding the meaning of their own law. Nevertheless, the British Government acquiesced in it, as a matter of policy, reserving the question of principle.<sup>3</sup>

The Servian Vice-Consul at Pristina in Turkey was assassinated in June 1890: the Turkish authorities making (it was alleged) no attempt to secure the culprit.<sup>4</sup> The Porte held that "a Government cannot be held responsible for any act of private vengeance committed within its territory, beyond making all reasonable effort to discover the author, and inflicting on him adequate penalty."<sup>5</sup> Servia at first asked for a march past by the Pristina garrison in front of the Servian flag; subsequently she expressed content with the funeral honours spontaneously rendered by the Turkish authorities, though she still pressed for an indemnity to the widow.<sup>6</sup> Four persons concerned were convicted and sentenced.<sup>7</sup>

A Russian (Kalobkoff), implicated in Panizza's plot to dethrone the Prince of Bulgaria, was condemned to

<sup>1</sup> 82 S.P. 374.

<sup>2</sup> 56 S.P. 13.

<sup>3</sup> 82 S.P. 376, Wheeler to Roldán.

<sup>4</sup> 83 S.P. 1148.

<sup>5</sup> *Ib.* 1158, St. John to Salisbury, 24 July 1890.

<sup>6</sup> *Ib.* 1161.

<sup>7</sup> *Ib.* 1188.

nine years' imprisonment in 1890.<sup>1</sup> His Government invoked the capitulations in his favour,<sup>2</sup> but with what success is unknown.

A monopoly of the tobacco trade in Persia for fifty years was granted to a Major Talbot in 1890. Great popular discontent was the outcome, the population fearing the influx of a flood of European officials. Russia also took umbrage. In fact, the agents of the monopoly, "with one or two exceptions," were admitted to be not the class of men successfully to perform the delicate task entrusted to them.<sup>3</sup> Throughout 1891 mullahs preached and merchants petitioned; the former taking up the sound individualistic doctrine that "it is against religious law that any one should be compelled to sell to any particular person," and that monopolist tobacco is "unclean." For a whole week, Sir F. Lascelles says, "smoking has been given up altogether in the capital." The monopoly was abandoned in December. In the meanwhile a large sum had been expended in organization. Compensation to the amount of £350,000 was spontaneously offered, plus £150,000 for assets at a valuation, and a settlement on these lines was arrived at.<sup>4</sup>

A Pennsylvania policeman, in 1892, took down two French flags which a French gentleman had displayed on his house in a lower position than the national colours. He was dismissed from office<sup>5</sup> by the municipal officials.

British crews of vessels seized by the Russian corvette *Zabiaka*, for seal-fishing off the coast of Siberia in 1892, were alleged to have been harshly treated, left without food and clothing, and forced to sign damaging admissions. Their evidence was somewhat discredited by the high character of de Livron, captain of the *Zabiaka*.<sup>6</sup> Further information was desired by Lord Rosebery, and duly promised.<sup>7</sup>

<sup>1</sup> 83 S.P. 1111.<sup>2</sup> *Ib.* 1167.<sup>3</sup> 85 S.P. 615.<sup>4</sup> *Ib.* 616.<sup>5</sup> *Ib.* 629.<sup>6</sup> *Ib.* 648.<sup>7</sup> 86 S.P. 236.<sup>8</sup> 87 S.P. 1060.

An attack on the men of the U.S.S. *Baltimore* in Chili (1891) was apparently directed against them in virtue of their nationality. In consequence, Chili paid £15,000.<sup>1</sup>

Italians were killed in prison at New Orleans by a mob in 1891, after a jury had acquitted them. The United States paid compensation (£25,000). The local authorities were clearly supine, but the riot was not directed against Italians in general.<sup>2</sup> Italians, in their turn, mobbed Frenchmen in 1893 at Naples and Genoa,<sup>3</sup> and Italy, consistently, paid an indemnity of 30,000 frs.

A Swiss, in 1893, was killed in Brazil. Switzerland maintained that this ' was the work of persons who desired to terrorize foreign colonists, and presented a claim for indemnity.

Where Chinese were killed at Rock Springs, Mr. Bayard only conceded \$147,748.74 as an act of grace; though admitting "the gross and shameful failure of the police to keep the peace, or even to attempt to keep the peace, or to make proper efforts to uphold the law or to punish the criminals."

An American whose property was injured by the firing at Rio in 1893, failed to induce his Government to take up his claim. It was certainly bad as regards damage by the insurgents, and it was more than doubtful as regards damage by the Government, observed the Foreign Department.<sup>4</sup>

It is said that nearly a million francs was paid by Brazil on account of three Frenchmen, killed in the course of the revolution of 1893; <sup>5</sup> but it is difficult to credit this.

Three Americans accused of damaging property in Guatemala, were imprisoned in 1894 (it seems illegally), and one of them beaten. Guatemala agreed to pay

<sup>1</sup> *Dipl. Corr. U.S.* (1891, 1892), *passim*.

<sup>2</sup> *Clunet*, 18 *Journal*, 1147.

<sup>3</sup> *Ib.* 21 *Journal*, 204.

<sup>4</sup> Cf. the Argentine case, *supra*, p. 159; *Clunet*, 21 *Journal*, 205.

<sup>5</sup> *Moore, Digest*, VI. § 1032.

<sup>6</sup> *Clunet*, 22 *Journal*, 925; *Times*, 26 March 1895.

\$1000 to the latter and \$100 to each of the others.<sup>1</sup> A Mr. Hollander, accused of forgery, was expelled in 1889 from that country, and a Mr. Wiener from Hayti.<sup>2</sup> To the complaints addressed by the United States in the latter case, Hayti replied that in 1890-1-2-4 British, French and Swiss had been expelled on political grounds without complaint arising. On her furnishing the evidence against Wiener, the United States alike desisted.

In Aug. 1894, a British ship, the *May Reed*, was seized in Hayti for smuggling. The master and two of the crew were detained in prison 166 days, before being finally acquitted. Meanwhile the ship had sunk. The cell used for the three men was 12 ft. square, with no sanitation, and contained (sometimes) twenty-two prisoners. It was "extremely close and filthy," and "miserably dirty." There were no beds of any sort. Water was short, and medical attendance refused. In this case Hayti paid compensation to an uncertain amount.<sup>3</sup> The combined slenderness of the evidence (or rather, absence of all evidence), the length of detention, and the extremely bad conditions prevailing, made this an entirely proper case for complaint. It was, absurdly enough, quoted in the *Costa Rica Packet* case.

In this somewhat celebrated case of the *Costa Rica Packet*,—in which Dr. de Martens committed himself to the vague doctrine of a cannon-shot limit for territorial waters, and also to that of the territorial character of merchant vessels,—the discomforts undergone by one Carpenter, the master of a British vessel seized by the Dutch, were somewhat particularly detailed.<sup>4</sup>

The reason of his detention was that he had picked up a small derelict and jettisoned her small cargo of spirits. He was given a high character by the testimony of his Australian friends (which there is no need to dispute—but it is not obvious why the Dutch were obliged to

<sup>1</sup> *Dipl. Corr. U.S.* (1895), 774.

<sup>2</sup> *Ibid.*

<sup>3</sup> 89 S.P. 1252, 1268.

<sup>4</sup> *Ib.* 1280.

accept it). He was also said to be well known in all the East Indian ports of Holland. He was arrested, three years after the incident occurred, in 1891, and taken a thousand miles to Macassar as a deck passenger (but allowed to pay for a second-class passage).<sup>1</sup> On arrival, he was "subjected to public and gross indignities" (not particularized), and placed in a room with no furniture but plank beds. An invalid prisoner occupied the same chamber. It must be remembered that in tropical climates a minimum of furniture is a necessity. The main requisite is cleanliness, and the cell was washed every day, and was probably somewhat damp. Carpenter did not contend that he was worse treated than a Netherlander would have been.<sup>2</sup> No injury to his health was shown by medical evidence, though it was alleged in the British brief. He was only in jail twelve days, and the examining magistrate at that early stage decided to dismiss the case. Instead of considering himself well out of it, Carpenter complained loudly in Australia against his treatment.

He said that the food was bad and that he was refused counsel; and also visitors, except in the presence of warders. The Dutch declared that the cell was open all day, that Carpenter refused the offer of an iron bed, that the food cost two florins a day and was better than army rations, that counsel and visitors were (perhaps improperly) allowed him, that he walked to court in advance of the warder, and that everything had been conducted with expedition. He would on release have been sent back without cost to Ternate, but had preferred to proceed to Sydney.

It is not necessary to decide on the discrepancies between the stories of Carpenter and of the Netherlands authorities. Admittedly, the process was short, and in

<sup>1</sup> See his declaration, 89 S.P. 1258. Holland denied this allegation.

<sup>2</sup> 89 S.P. 1262.

the end satisfactory, while the conditions of confinement, if not ideal, were certainly not atrocious.

Great Britain asserted that the Dutch authorities would never have put Carpenter on trial at all, had they exercised reasonable care; and, further, that even if there had been some fair ground for thinking that his seizure of the boat had been effected in territorial waters, the proceedings were oppressive, considering the captain's character and position.

This amounts to a licence to well-conducted persons to be free of all inquiry into their conduct when abroad. The powers of administrative authorities to institute prosecutions cannot be hampered in this way. Want of reasonable care is a charge very easy to make, very vague in its scope, and very difficult to meet. In fact, the Law Officers of the Crown at first advised the British Government that there was no case (1894).<sup>1</sup> They denied, with perfect propriety, "any supposed right of H.M. Government to question in the case of British subjects the sufficiency or expediency of the system of criminal law adopted by a friendly nation for the governance, within its dominions, of all persons alike."

The question of fact, whether the ship was within territorial waters, was clearly a difficult one, in the conflict of testimony. No official could be called "unreasonable" for bringing it before the courts. The complicated inquiries as to currents, geography and the like, which the British case recommends as proper, are utterly unreasonable and such as no prosecutor in a case of petty theft such as this would undertake. The fact that in Britain the proper remedy against Carpenter would have been a civil action, whilst in Celebes it was a criminal process, is of course of no importance.

Dr. de Martens, besides laying down the dubious

<sup>1</sup> *Counter-case of the Netherlands*, 89 S.P. 1211. (The whole case was not before the Law Officers, according to the British Reply, at p. 1248.)

propositions above mentioned, declared that it is the "duty"<sup>1</sup> as well as the right of a state to protect by all methods authorized by the law of nations, its subjects who may be affected by wanton prosecutions or by injuries<sup>2</sup> taking place to their prejudice abroad. He declared that national sovereignty and judicial independence cannot operate to the point of depriving foreigners arbitrarily of the safety which should be secured by law to everybody resident in a civilized state. He found that the Netherlands courts had no right to pronounce on the effects in law of a seizure effected outside their territorial jurisdiction. He found that there was no reasonable cause for the detention of Carpenter, and also that he had not been detained under suitable conditions. And he awarded Britain the enormous sum of £11,082 7s. 6d.<sup>3</sup> damages and interest.

It is certain that this award goes far beyond any other decided case. In so far as it is definite, it sets up a standard of unsustainable severity. For the rest, it lays down a number of wide propositions, of which some are eminently disputable, and the rest are of vaguely humanitarian sound but of little definite meaning. Of De Martens' wide declarations, as of such pious deliverances in general, one need take little account. His attitude towards the particular facts of the case is more instructive. In the judgment of most impartial persons, the Dutch Government will be held to have acted, harshly perhaps, but strictly within its rights. If a government must weigh with scrupulous nicety

<sup>1</sup> To whom?

<sup>2</sup> "Lorsqu'ils sont l'objet de poursuites arbitraires ou de lésions commises à leur préjudice."

<sup>3</sup> Carpenter's present claim was cut down from £7500 (including £500 for expenses, £2000 loss of profits, and £5000 "moral and intellectual damage") to £3150 (still, it would seem, grossly excessive). The crew (for interruption of business) were given £1600 instead of £8000; and the owners (for forced sale and loss of profits) £3800 instead of £16,100. See Award, 89 S.P. 1284.

the grounds on which it is to proceed against offenders ; if it must provide for foreigners prisons of the most approved sanitary pattern ; if it must necessarily adopt the views as to jurisdiction of some particular school of theorists ;—then, and not otherwise, the arbitral judgment may be justified.

Dr. de Martens' decision is above all regrettable, in that it tends to cast doubts on the cardinal principle of the independence of the judicial authorities.<sup>1</sup> No jurist, however distinguished, can at one blow annihilate so many established doctrines of international law as in this decision the great Russian endeavours to do.

Scarcely less objectionable is the refusal to states of all right to penalize foreigners for crimes committed outside their borders. In attempting to enforce upon States a cut-and-dried theory of jurisdiction, Professor de Martens leaves out of account important considerations. In general, a state may be well advised to take no notice of what has been done abroad. But it may easily be otherwise. The unpunished presence in their midst of a man whom they regard as a criminal, is a moral shock to the collective conscience of the community.

The many quotations which the British case gives from jurists, relate mainly to the forcible exercise of jurisdiction by one state *manu militari* outside its territorial sphere of action. They have no relation to its unlimited right to appreciate events which take place abroad in its own way, and to proceed within its own territories in accordance with the result of that appreciation. Phillimore,<sup>2</sup> Hall<sup>3</sup> and Halleck<sup>4</sup> seem to be alone among Anglican authors in maintaining that a

<sup>1</sup> Compare the case of the *Léon XIII.*, in which a Spanish ship-master was refused redress for imprisonment at Singapore arising out of non-compliance with a *habeas corpus*, the object of which was to inquire into the legality of his treatment of offences said to have been committed on the high seas. *Supra*, p. 197.

<sup>2</sup> *Int. Law*, I. 388.

<sup>3</sup> *Int. Law*, I. ii. § 10.

<sup>4</sup> *Int. Law* (ed. Sir G. Sherston Baker), I. 206, 207.



state cannot take cognizance of offences committed by foreigners abroad. And it is universally admitted that in many cases affecting its own interests, a state both can and does so. Wheaton<sup>1</sup> says that no state can *directly* affect persons or property beyond its own territory—thereby implying that indirectly it can do so, by proceedings or the threat of proceedings within its jurisdiction. And so Twiss<sup>2</sup> says that a nation cannot *directly* bind property or control persons situate or resident abroad. Again, in the “Cutting” case, the U.S.A. failed to obtain any satisfaction for the imprisonment in Mexico of a Texan who had libelled a Mexican from the safe vantage ground of the opposite bank of the Rio Grande. Mr. Mariscal’s<sup>3</sup> despatch (10 Febr. 1888) is worth perusal upon this.

No one who candidly reads the details of the cases previously recounted in this and the preceding chapter can doubt that, in his laudable anxiety to set a high standard of civilized comfort all over the globe, Dr. de Martens gave a decision in this instance which went far beyond all recognized law.<sup>4</sup>

Fortunately, the strong doctrine of this case was soon contradicted. Mr. Tillett, a British subject, was arrested at Antwerp in Aug. 1898, and expelled as an agitator from Belgium under circumstances said to amount to indignity and hardship and to have affected his health.

He was denuded of all clothing and placed in a prisoners’ cell. This was stated to have been damp, noisome and dirty. He was clothed in prison dress, refused counsel and visitors, and (he alleged) ill fed. After a full day he was released and taken to the steamer. He contracted a severe chill, and injury to respiration; he sustained a nervous shock and was completely prostrate

<sup>1</sup> *Elements*, II. § 78.

<sup>2</sup> *Law of Nations*, x. §§ 157, 158.

<sup>3</sup> *For. Rel. U.S.* (1888), 114.

<sup>4</sup> See A. E. Blès, *Rev. de D.I.* (1896), 452, where the opinions of authors are well summed up.

according to the official Memorandum,<sup>1</sup> which demanded for him the modest sum of £3000 : not much, since the unfortunate man had been obliged to go to Australia for the re-establishment of his health.

The Belgian Government justified its conduct by its apprehensions that Tillett would resume a campaign of disorderly violence which they asserted he had commenced in the preceding July. The allegations of ill-treatment were denied. And if they were true, we know how disagreeable Charles Marvin found his London lock-up.

The question, however, was referred to arbitration, and the result was to convince Mr. Desjardins, the arbitrator, that the cells were perfectly healthy, that the prison dress was not forced upon Mr. Tillett, and that no connection between the imprisonment and the breakdown of his health had been proved. He further found that the Belgian Government had grounds of suspicion of Tillett, and that their action in arresting and detaining him was therefore legitimate.<sup>2</sup> It is possible that if Professor de Martens had been able to inspect the Netherlands Indian prison, as Mr. Desjardins inspected the Belgian, his award might have been different.

It is undignified and undesirable that there should be wrangles between Governments as to whether facts should have looked quite as black to the one side as they did to the other ; or as to the precise amount of accommodation which an unconvicted prisoner ought to have. Such matters as the appreciation of evidence are best left entirely within the province of the territorial power. It is only when it is palpably and flagrantly wrong, that complaint ought to follow. Interference should be limited to cases of " palpable injustice, such as would be obvious to all the world,"<sup>3</sup> as a great American statesman happily phrases it.

<sup>1</sup> 92 S.P. 79.

<sup>2</sup> *Ib.* 105.

<sup>3</sup> Forsyth (U.S. Secretary of State), *apud* Wharton, *Digest*, II. § 230.

In 1895<sup>1</sup> an American policeman (Oberlander) was arrested in Mexico, on the charge of attempting to effect an arrest. He escaped, and was somewhat roughly recaptured. Don V. Quesada, Argentine Minister, arbitrated, and held that Oberlander's remedy (if any) was in the Mexican courts. Consequently, neither he nor his hostess (Messenger), from whose house he was taken, had any valid claim.

A parallel to the Bonn case<sup>2</sup> occurred in 1895, when an American (Stern) was sentenced to two weeks' jail and a heavy fine for insulting and threatening the manager of a state dancing-room at Kissengen. His release was pressed for, but apparently on grounds of comity merely.<sup>3</sup>

Three Italians were killed in Colorado in 1895, and \$10,000 paid in respect of this.<sup>4</sup>

In 1895 France attacked San Domingo. A private dispute between the President and a French bank was one ground; a private assassination (though the assassin was arrested) was another. Mr. Hanotaux sent a high-handed ultimatum; relations were broken off. The U.S. Minister at San Domingo rightly considered that "the summary demand for the summary execution of a criminal as well as the similar apparent disregard of the local laws in the case of the bank," could scarcely support a *bona-fide* ultimatum. The friendly offices of the States led to an accommodation.<sup>5</sup> In spite of the murderer having been killed, San Domingo paid an indemnity of 225,000 frs., and apologized: a most unheard-of result, and one which may fairly be called unjust in the extreme. A further sum of 1,000,000 frs. was promised on account of the claim of the bank.

Italy's endeavour to emulate her neighbours by establishing a hold on Abyssinia, came to a tragic end in 1896. Forts were set up at Massowah and other places, and the

<sup>1</sup> See *U.S. Dipl. Corr.* (1897), 382.

<sup>2</sup> *Supra*, p. 128.

<sup>3</sup> *U.S. Dipl. Corr.* (1895), 471 *et passim*.

<sup>4</sup> *Ib.* (1896).

<sup>5</sup> *Dipl. Corr. U.S.* (1895), 241, 401.

Abyssinian Negus, Johannes, wrote to the Queen of England complaining of this as contrary to the Brito-Abyssinian treaty. The Queen was advised to write, somewhat lamely, that "the Italians were a strong nation"—but that they meant well, and that she would do her best to appease them. King Johannes was able to dispense with British mediation after Adowa. The occasion, however, afforded Sir G. Portal the opportunity of establishing his reputation. From the first, he considered the Italian force insufficient.<sup>1</sup>

"Only God knows the result of war, and victory is Christ's gift," said Johannes: the Queen had written to tell him that Italy was very powerful; but he was strong also; the right was on the side of Abyssinia, and the issue of the war in the hands of God.<sup>2</sup>

On 10 Sept. 1897 a mining riot took place at Lattimer in Pennsylvania. Austrian subjects were shot in the course of its suppression. As the Sheriff and his deputies were acquitted by the courts, compensation was refused.<sup>3</sup>

Into the history of the Transvaal we need not enter. The claim for political rights by British subjects there was complicated by the existence of suzerainty, which removed the case from the ordinary category.<sup>4</sup> Needless to say, no such demand could be recognized for a moment by an independent state of any description. The concession of Home Rule to the Rand would have been the burghers' true policy. It is unnecessary to discuss the *pros* and *cons* of a lost opportunity.

Nor need the history of the Cretan imbroglio, in which it was not so much the interest of their compatriots,<sup>5</sup> as that of their co-religionists, that provoked the intervention of the Greeks, be here considered.

<sup>1</sup> 79 S.P. 690.    <sup>2</sup> *Ib.* 697, Portal to Baring, 1 Jan. 1888.

<sup>3</sup> 91 S.P. 1260, Message of U.S. President, 5 Dec. 1899.

<sup>4</sup> See the writer's *International Law in South Africa*, c. 1.

<sup>5</sup> See 90 S.P. 1312, Lascelles to Salisbury, 12 Febr. 1897.

French and British subjects were killed by rioters in China in 1891. Two of the rioters were tried and executed by the Chinese, and others arrested. But the British Minister pressed for further activity, and was answered that considering the distances apart of the places affected, no undue delay had occurred. Officials had been dismissed and reduced.<sup>1</sup> This seems to have been accepted as sufficient.

It was not until 1899, however, that the missionary riots became invested with the intense character to which the name "Boxer" has been popularly attached. Mr. Brookes, of the Church of England Mission, was killed on the last day of the year; on this occasion special Imperial apologies were offered.<sup>2</sup> He seems to have exposed himself unnecessarily, and Sir C. Macdonald felt no serious apprehensions for the safety of his companion missionaries. Three of the guilty parties were promptly captured. The proceedings of the malcontents nevertheless were rapidly extended from the persecution of native converts to an open attack on foreigners.<sup>3</sup> The principal Ministers then demanded specifically the suppression of the objectionable societies. Naturally, this was a request going considerably beyond their rights, and one which a very slight acquaintance with China will show to be one which it was impossible effectively to comply with. The subsequent events, including the attack on the Taku forts, the siege of the Peking Legations, and the despatch of an allied force to their relief, do not concern us. The European powers had, rightly or wrongly, made government by the constituted authorities of China impossible, and they alone were responsible for the result.

Not content with the devastation (which we charitably assume to have been unavoidable) wrought by the allied expedition, nor with its triumphal entry into Peking, the German Government insisted upon individuals being

<sup>1</sup> 83 S.P. 468.

<sup>2</sup> 94 S.P. 1053.

<sup>3</sup> *Ib.* 1061, 1120.

delivered up for vengeance. The United States, Japan and Russia preferred that the Chinese authorities should proceed against them in a legal way. Russia also expressed a preference for the penalty of exile rather than of loss of life, for political offences of the kind in question. The other powers just named came to accept the view that insistence on the capital penalty was inopportune, and France eventually agreed with them.<sup>1</sup>

One Pears was shot by a sentry who had challenged him at San Pedro, Honduras, when the place was just released from a state of siege in 1899.<sup>2</sup> This was merely part of the fortune of war ; but Mr. Hay managed to get \$10,000 for Pears' relations. He argued that the sentry had shot without observing the formalities required by Honduras law. Honduras admitted that he might not have acted with the utmost circumspection, but absolutely refused to penalize him after his exculpation by the military court. She paid the indemnity, however, under protest. This is believed to be almost the only case in which responsibility has been urged for the merely negligent acts of an official ; indeed, for the wilful acts of a private soldier, his government is not generally liable.<sup>3</sup>

In 1901 Italians were still the subject of outrages in the States. Indemnities were paid as of grace. Mr. Carignani protested against the supineness of the authorities, as a denial of justice, a violation of contractual engagements, and a grave offence to every humane and civil sentiment.<sup>4</sup> The demands of the United States on Honduras are, in this connection, inexplicable.

A French company had constructed wharves and reclaimed land from the sea, at Constantinople. In 1899<sup>5</sup> the Turkish Government formed the desire of repurchasing the premises. Although confiscation without

<sup>1</sup> 95 S.P. 1308.

<sup>2</sup> *For. Rel. U.S.* (1900), 674.

<sup>3</sup> Cf. pp. 151, 177, *supra*.

<sup>4</sup> *Ib.* (1901), 297, Carignani to Hay, 14 Nov. 1901.

<sup>5</sup> *Archives Diplomatiques* (1901-2), 74.

compensation was not threatened, Mr. Delcassé insisted <sup>1</sup> that "pour le prestige français . . . du moins l'administration et l'exploitation des quais devenus ottomans devraient être confiées à une société française." That, he said, was a minimum from which he could not recede, and perhaps it might scarcely be sufficient for the safeguarding of French "moral interests." A further difficulty arose through the failure of the Porte to pay damages to French subjects which had been awarded by the Ottoman courts.<sup>2</sup> On 9 July 1901, Mr. Constans peremptorily demanded that the French company should be reinstated in the full ownership of the wharves, and the idea of expropriation abandoned. Promises of accommodation were not fulfilled,<sup>3</sup> and the Ambassador left Constantinople. Delcassé then seized Mitylene.<sup>4</sup> Both in the nature of the demand and in the manner of its enforcement, these proceedings were in a high degree improper. The question of the wharves was practically settled,<sup>5</sup> and the sole reason for which France violently invaded Turkish territory was the non-payment of a trivial private debt. Various demands of a religious character were thrown in as a make-weight.

A remarkable decree of Hayti in 1903 closed the country to "Syrians," whose immigration was said to amount to nothing short of an invasion by a horde of strangers who would not mix with the population of the country.<sup>6</sup>

The United States protested (as in the case of their Jewish citizens who were expelled from Russia),<sup>7</sup> particularly when Syrians were refused the right of retail trade. Rightly, however, they did not press the matter,

<sup>1</sup> *Archives Diplomatiques* (1901-2), 76, Delcassé to Constans, 17 July 1900.

<sup>2</sup> *Ib.* 78, but see pp. 99, 103, which show that this statement requires qualification.

<sup>3</sup> *Ib.* 84-98.

<sup>4</sup> *Ib.* 108. See *infra*, p. 251.

<sup>5</sup> *Ib.* 110, Delcassé's Note of 30 Oct. 1901.

<sup>6</sup> 96 S.P. 506.

<sup>7</sup> *For. Rel. U.S.* (1905), 547.

as it seems to be one for internal regulation. When, as in Colombia in 1903,<sup>1</sup> there were riots in which their Syrian subjects suffered loss and injury, no claim for compensation was made.<sup>2</sup>

Various grievances of a more or less trivial nature against the Venezuelans are detailed in the *British State Papers*, vol. 95, p. 1064, as occurring in 1901. (1) Some British subjects *en route* to Port of Spain in boats were, for unknown reasons, summoned, with Venezuelans, on board a Venezuelan armed ship, whilst those who refused were left marooned. (2) A Trinidad fisherman landed at Patos (an island between Trinidad and Venezuela), and was, with his crew, attacked and fired at, his boat being seized. (3) A Venezuelan ship, owned by British subjects, had her crew removed and was set on fire and scuttled, on a charge of assisting revolutionaries. There was evidence in support of the charge, and Great Britain forbore to press the claim which she considered arose. (4) A Venezuelan coastguard boat seized a British smuggler at Patos. (5) On an accusation of smuggling, the British sloop *Indiana* was seized in the River Barima, as Great Britain considered, without evidence of the *corpus delicti*. (6) A British vessel, the *In Time*, was sunk in Venezuelan waters during operations of war. (7) The *Queen* was seized on the high seas twenty miles off Campano, on a voyage from Grenada to Trinidad. (8) A British subject, Gransaul, had been seven months in jail on a political charge.

Of these complaints, 1, 2 and 4 arose simply out of the fact of the dispute as to the ownership of Patos. It was faintly alleged that the acts complained of would have been unlawful if done in Venezuela, but there seems to have been no discrimination against foreigners in them,

<sup>1</sup> *For. Rel. U. S.* (1903), 129.

<sup>2</sup> See, on the general question of Syrian immigrants, *ib.* (1903), 598. They are stated by Commissioner Powell to have crowded out the native merchants.



and no wanton cruelty. Charges 3 and 5 concerned acts done with, at any rate, colour of right. Charge 6 was apparently an exercise of *droit d'angarie*, parallel to the sinking of British ships in the Seine by the Germans. Charge 7 appears to have been the only serious one; and it is certainly grave.

The real complaint against Venezuela was the fact that "British" railway companies in that country considered they had claims for damages on account of the depreciation of government bonds and the acts of government forces. Clearly, foreigners in a foreign country must take the risks, along with natives, of military proceedings. It is no doubt usual to compensate private persons injured by warlike operations. But it is an act of grace. It is difficult not to feel that the complaints about Patos and the *Queen* were the legal husk of a moral complaint. Afterwards, a more serious event took place; a British subject (Jones) was (according to his account) deliberately set on, in consequence of a previous quarrel, by the local police. Another (Sampty) was impressed, but promptly released. The *Racer* sloop went ashore on the Venezuelan coast, and was pillaged.

Germany was making contemporaneous complaints, based frankly on the consequences of the civil war of 1898-1900. Joint war was in the result waged by Britain and Germany. That war existed is undeniable. Mr. Balfour asserted it in his place in Parliament, and the Venezuelan Government declared its intention of meeting its legitimate obligations "as soon as peace is declared."<sup>1</sup>

By what is really, if not in name, the Treaty of Peace, Venezuela agreed to satisfy the minor claims by the payment of a comparatively small sum, and to refer the war-claims to a mixed commission in the ordinary fashion. And it was agreed that the Treaty of Commerce of 1834 should be confirmed, "as it may be contended that the

<sup>1</sup> 95 S.P. 1117, Haggard to Lansdowne, 14 Dec. 1902. Cf. 116 *Hansard 4th Ser.* 1245, etc.

establishment of a blockade . . . has *ipso facto* created a state of war." In fact, Lord Lansdowne stated that it did.<sup>1</sup> It was held by various arbitrators that Venezuela was not liable for damage, done by insurgents, which she could not control.<sup>2</sup>

A British sealer was seized in 1904 by Uruguay,<sup>3</sup> and the master and mates were charged with smuggling. The case remained undecided from 11 Nov. 1904 to Aug. 1905. This was attributed to the action of defendants' counsel. Eventually a sentence of ten months (from date of arrest) was passed.

In 1904 there was a disposition on the part of European governments to occupy Dominican territory as a security for debt.<sup>4</sup> This would have been a highly blamable measure. It was frustrated by the negotiations for the administration of the revenues by the U.S.A., on the pattern of the joint control of those of Greece. The Dominican diplomacy was exceedingly skilful. By the very fact of the negotiations European powers were put in a state of uncertainty. But Dominica was not committed to the U.S. proposals.

Seamen of a U.S. warship drowned a Chinese at Canton in 1904, and the United States paid £300, though not admitting the facts.<sup>5</sup>

U.S. citizens whose land was trespassed upon by the Guatemalan local authorities in 1905, were accorded small indemnities. It would appear that the Guatemalan Government put pressure on its officer to make satis-

<sup>1</sup> 95 S.P. 481, Lansdowne to Herbert, 13 Jan. 1903. "The establishment of a blockade created *ipso facto* a state of war between Great Britain and Venezuela, involving, it might possibly be contended, the abrogation of any Treaty existing between the two countries."

<sup>2</sup> Moore, *Digest*, § 1045.

<sup>3</sup> *For. Rel. U.S.* (1905), 916.

<sup>4</sup> *Ib.* 304. Probably Italy was the active party. For a history of Dominica (nineteenth century), see *ib.* 382.

<sup>5</sup> *Ib.* (1905), 112.

faction personally.<sup>1</sup> When in Smyrna a policeman assaulted a U.S. citizen, an apology was given.<sup>2</sup>

A recent case to be compared with the Peruvian and Singapore shipping cases already mentioned is that of the *Olof Wyk*. This Swedish steamer arrived in Antwerp, 15 Feb. 1907, with the bodies of four deceased persons on board. One, Tcherniak, was a Russian revolutionist.<sup>3</sup> The Swedish Consul at Antwerp was permitted to take the whole cognizance of the affair, and was assisted by the Belgian courts.

In March 1909 the High Court at Viborg increased a sentence passed on the captain of a British trawler for fishing in prohibited waters off Iceland to eighteen months' penal servitude and a fine of 3,200 kroner. The captain was further charged with upsetting a boat through carelessness, whereby three Icelanders were drowned. The steersman and cook were also sentenced to terms of imprisonment.

The arrangements arrived at by the various powers for taking over the administration of the Morocco coast towns do not appear to be working well, and have already brought diplomacy within an ace of a European war. The right to acquire land has been conceded to foreigners by Morocco, but acute conflicts might at any moment arise as to the terms on which it is to be held, and its alienation and descent regulated. As to the multiple control established over Moroccan finance, it can only be said that its fruits are not yet apparent.

<sup>1</sup> *Ib.* 529.

<sup>2</sup> *Ib.* (1903), 733.

<sup>3</sup> *Rev. de D.I.* (1907), 316.

## CHAPTER VI

### TERRITORIALISM

WHEN the principles of Authority and Individuality were brought into collision at the time of the Reformation, and the old foundations of society were broken up, the world cast about for a common element on which to re-unite, and found it in the essentials of material comfort. Society was re-organized on a cash basis, and the era of industrialism was ushered in, which has now worked itself out to its logical development of complete individual isolation. People found that they could live in exile, and even live pleasurably in exile. Emigration, as distinct from migration, dates from the Reformation time. Formerly one was hopelessly out of one's element abroad. One could only breathe freely among one's neighbours. But, when one's neighbours took to pillaging and burning one, it was easier to dare the unknown. And Saxon fled to Poland, and Bohemian to Prussia, whilst French Protestants came in troops to English towns. In their new homes there was no established niche of ancient custom for them: they came simply with what they could offer of aptitude for craftsmanship and labour. The territorial states which from 1648 to 1848 stood in absolute independence as the rigid framework of the European system, precluded that period by an attempt to live by militant Catholicism or Protestantism as the case might be. But the world would accept neither ideal, nor would it accept eternal religious war. The only escape lay in the recognition of absolute

territorial sovereignty. This meant that Catholic and Protestant divided Europe between them. Theoretically claiming propaganda as a right and a duty, they yielded to the logic of facts, and renounced the pretension of saving their neighbours from hell at the sword's point. It is as though the English, weary of the educational struggle, were to acknowledge that there was no possible method of accommodating the conflict by compromise ; and were to cut the knot by declaring that teaching in half the counties of England should be High Anglican, and in the rest Undenominational, with a secular London corresponding to Mohammedan Turkey. Thenceforward, territorial absolutism was the postulate of the statesman.

The Renaissance, filtering down to the quiet populations, had made it impossible that the old bonds of cohesion should continue. It had broken up the community of ideas that had kept them strong, for it had introduced indefinite avenues of variation. The free Greek daimon of self-culture had been released from its iron casings sealed with the Hebrew seal of Solomon, and had risen from the Eastern sea, dim but powerful. It worked like a ferment in monastery and village, as well as in palace and camp. The Reformation was at once the symptom of the decay of the old order and the precipitation of its ruin.

The old order had reached from heaven to earth : the new was frankly limited to a single point. The Prince was supreme ; that, for Luther as for Austria, was all-sufficient. Five hundred years before—one hundred years—Europe had looked from the serf to the freeman, from the freeman to the lord, from lord to count, from count to duke, from duke to king. Beyond the throne stood the moral force of all Christendom concentrated in the more than half-sacred majesty of the Emperor ; who, little as he might wield of physical force, represented a Unity of Law and a Supremacy of Right.

And above and beyond the Emperor's orb'd sceptre, towering into the very azure, as the serf sank almost into animated dust, was the wholly sacred and divine power of the Patriarch of Rome, the visible Vicar of Heaven.

The absolute modern king, on the contrary, acknowledged no legal duties towards superiors or inferiors. The spiritual empire of Rome and the temporal empire of Frankfort had abandoned their seats, and that intellectual power alone continued which was fabled, the third in that trinity, to reign at Paris, and reigns there unacknowledged to this day through its legates the editors and professors of the two worlds, but with a coercive power which is only just beginning to be understood and bridled. There needed some mediator between the absolute Princes of the new age. They could not live in anarchy. "How can anything be done anywhere without some law?" asks Carlyle. A lawgiver was necessary. And the world found it in the interpreter of Right Reason—Hugo Grotius. As the plenipotentiaries of the power of instructed common sense, he and his followers filled the gap, and gave a Law to the absolute masters of Europe.

The basis of that law is Territorial Independence. And until we have something better to put in its place, we shall do well to avoid tampering with that fundamental hypothesis of all modern politics. The absolute sacredness of a nation's land is the vital nerve of our present system. Other institutes of the Law of Nations may be roughly hacked and hewed about. It can survive the disappearance of many salient features. But let that vital element be touched with a needle's point, and the whole fabric shudders with a terror of dissolution.

There is no saying how far you may go, if you are once admitted to infringe the territory of your neighbour. Putting aside the half-right of stepping within his bounds

to avert a great injury which there is no time to get him to avert for you—(as in the case of the *Caroline*)—offering him all possible explanations and apologies, the inviolability of his dominions can only be infringed in process of lawful war. No more dangerous doctrine was ever broached than that by which modern authors justify the exercise of forcible acts by one state within the bounds of another without the excuse of war. The result of admitting it would plainly be that states would constantly carry out their own will in their neighbours' territories on the chance that the latter would not dare to resent them. We should then have an anarchic world in which states were liable to repeated casual incursions by others who traded on their weakness. The homely observation of Mr. Wemmick is not to be forgotten—"Castles mustn't be broke open, 'cept in war-time."

The stock argument which is used is not even specious. If the horrors of war are justifiable, it is said, *à fortiori* so is any lesser violence. This is the same as to say that, because you may kill an enemy in fair fight, you may violently maim an unarmed wayfarer. The cases are not *in pari materia*. A nation which goes to war incurs a crowd of responsibilities, an indefinite number of risks. It incurs an assurance of neutral disfavour. It incurs a certainty of general odium as a disturber of the public peace. It is clearly no argument to say that because, subject to all these disadvantages, it may inflict the evils of war, it may therefore inflict lesser evils—(by how much lesser, one ventures to inquire ?)—without incurring any such checks. War is certain to involve it in some damage : if its net material result is to the credit side of the balance, it is impossible to weigh and measure lives and suffering. War is likely to involve it in foreign complications : its enemies may find allies—its friends may plead altered circumstances as an excuse for desertion. War will shut it out like a leper

from neutral ports, and its troops from the use of neutral passage.

If it chooses to pay that entrance-fee, it may cross its neighbour's frontier and enter the Jezreel vineyard. But it cannot face both ways, and say that in time of peace it is rightfully disporting itself there. Its presence there is only justifiable by the existence of war. If it estops itself from saying that there is war between itself and the invaded power, it puts itself hopelessly in the wrong. If there is no war, it is a simple burglar. The self-contradictory theory is advanced by some, that the invading state is doing no wrong, but that the invaded state may rightly resent its action by war. But where there is no injury, there can be no cause of war. Again, sometimes it is held that pacific violence of this kind is an extraordinary hybrid of war and peace, depending for its character on whether the invaded state chooses to consider it as war, or not. Needless to say, there can be no such onus thrown on the assaulted party to make it quite clear to the world that he considers himself assaulted. He may turn the other cheek to the smiter and expressly ratify and assent to his violence. But common sense tells us that an attitude of such remarkable humility is not to be inferred from mere inaction in the face of the invader's proceedings. The truth is that when one nation<sup>1</sup> sets out to work its will by violence in the territory of another, it goes to war with it, and no amount of protestation

<sup>1</sup> The word "nation" is used throughout as a name for an organized community, in consonance with usage, universal up to a recent date. The etymological pedantry which would restrict the term to denote a race, deprives the language of a word which has no precise equivalent, for the word "state" connotes the idea of government rather than that of country. "Nation" means the country in its organized aspect, and has little but an historical connection with the notion of community of racial origin. Etymology, as Moulton, L.J., has shown us, is a good servant but a bad master.



that it does not mean to do so will make the fact any different.

The absurdity of the novel contention will be plainly seen when it is reflected that a powerful state might in this way permanently occupy, with a profusion of peaceable phrases, a whole province belonging to another, and have every facility put at her disposal in neutral harbours and employ the aid of neutral troops: whereas she could not so much as keep a ship for a week in a neutral harbour and take in a ton of gunpowder, if she were attempting to exact a paltry indemnity by means of declared war.

Perhaps the conjecture may be hazarded that the idea which leads to such absurd results has arisen from the fact that very inconvenient practical consequences follow from the admission that two states have been at war. Their treaties are all broken and invalid—their subjects' mutual partnerships have all been dissolved—reciprocal trade has been illegal—naturalizations have been void—innocent assistance to the enemy has been treason, and so forth. It is simpler, when one state has been passive, and matters are eventually accommodated, to say there has been no war. The next step will be, to say that there has been no war, when its forces have not been passive, but no formal intimation that it considers itself at war has been made. War will then disappear, and "mutual violence" will succeed it; which naturally will be regulated by no principles until it is recognized as simply war under a new name. Meanwhile, the confusion will be appalling. For as we know from Chinese experience, war which is not styled "war" and is not governed by its rules, is simply embittered savagery.

Mr. Dooley's Chinaman at a mythical Hague Conference takes this view, on hearing that the Peking Expedition is regarded as "an expedition to fulfil the high moral duties of Christian civilization"—"Thin, I'm for war,"

he says, 'it ain't so rough,' he says, an' he wint home." Parenthetically, it may be noted that the over-elaboration of rules of war is enough to tempt any nation to absolve itself from their observance by proclaiming as emphatically and as often as it can, the pacific nature of its military operations.

It is of course easy to say that if war is so much preferable to peaceful violence, the invaded state can always declare it. That is to say, it may elect to be annihilated rather than to be unresistingly despoiled. What state is likely to do so? The existence of such a grim alternative, will only encourage the invader. It is precisely because he knows that the only alternative to submission is to incur a much more serious war than that which he is waging and styling "peace," that he hopes to get his way without opposition. It is to put temptation in his very path, to offer him the bait of peaceably taking all he wants, on the sure calculation that his opponent will be only too glad to keep quiet.

There is no limit to the unjust, uncertain, or trivial demands which might then be enforced. The nation which would be ashamed or afraid to go to war in pursuit of them, in the face of the world, will be under no restraint in helping itself to compensation by a peaceful little expedition which will attract little or no attention.

The great securities against aggression are the certain risks and losses of war, and the odium which attaches to those who disturb the peace of the world. Once admit that a state can peaceably invade another, in confidence that it will prefer submission to war, and that security dissolves into thin air. There are no risks: there are no losses: there is no odium or suspicion. The only irritation that neutrals will feel will be against the invaded state, if it plucks up courage to throw down the gauntlet and inaugurate a régime of war:—why could it not pay and look pleasant?

States would be actually encouraged to aggression. The strong would become stronger and the weak weaker. At present, an invader knows that it must be war or nothing. He may well hesitate to invoke that tremendous issue. If the innovation of "conditional war" were admitted, he would inevitably trade on his adversary's weakness, to gain the spoils of war without its responsibilities. Sometimes he would miscalculate; and a war would supervene which never would have been so much as thought of, if the aggressor had not thus been tempted on to the slippery slope of peaceful hostilities.

Such deplorable occurrences, therefore, as the infringements of territorial sovereignty which have been witnessed on rare occasions in Southern Europe and in Central America, are on all grounds to be deprecated as introducing an element of anarchy into international affairs which outweighs beyond comparison the petty advantages supposed to accrue from them. Nations are rightly jealous of allowing the shadow of foreign force on their territory. An exaggerated jealousy of this kind may be misplaced, as when the offer of Admiral Sperry's marines was refused by the Governor of Jamaica at the time of the Kingston earthquake. But in spite of the feeling aroused by this incident, it was only a year or two later that the Australian authorities declined to permit the landing of sailors from the U.S. fleet to attend a ceremonial parade unless they left their rifles on board. The slightly ridiculous compromise seems to have been arrived at, that they should bring their rifles and leave their cartridges. The feeling which prompts all such care, even to the point of punctiliousness, is intelligible. Physical force in its highest expression must be kept rigorously outside the limits of a state, unless it is its own. No nation, however strong, can afford to weaken the principle that a state must be free within its borders. It is always open to the attacks of combinations. Its very strength invites them. And

as Dr. Barbosa reminded the last Hague Conference, the strong nation of to-day is not necessarily the strong nation of a hundred years hence. Nations grow: and they have memories.

When we see Britain occupying a custom-house in Nicaragua, and dispossessing the national troops by a show of force: when we see the United States landing marines at Colon or Amelia Island: when we see France coolly laying hands on Mitylene or Chantabûn,—we are witnesses of flagrant illegality which is in its essence destructive of the independence of Britain, France and the States. We see them bartering away principle and security for the satisfaction of extorting a few thousand piastres, or salving a few warehouses. The fabric of society is territorial: if it is once admitted that one state can, without war, carry out its will by force in the realm of another, there is an end of all law and order. The national law is converted from an axiom into an hypothesis.

In 1849, the British Chargé d'Affaires (Chatfield) at Guatemala seized a Honduras island by way of reprisals. Palmerston "apprehended that such a proceeding was an allowable means"—but it went far beyond Mr. Chatfield's instructions, and his act was disavowed, in face of the complaints of the United States, to whom the island had been ceded for an eighteen months' lease. (The case is noteworthy as a very early instance of "cession by lease.")<sup>1</sup>

Ferrara was occupied by Austria in 1847,<sup>2</sup> but under treaty powers. Subsequently, in July 1848, Austria invaded the States of the Church;<sup>3</sup> and it can hardly be doubted that the subsequent operations presented all the essential characteristics of war. They were so characterized by Antonelli,<sup>4</sup> after good relations had been restored. Corinto was invaded by Britain in 1895,<sup>5</sup> and

<sup>1</sup> 40 S.P. 1002.

<sup>2</sup> 36 S.P. 1245, 1280.

<sup>3</sup> 41 S.P. 1210.

<sup>4</sup> 45 S.P. 407.

<sup>5</sup> *Infra*, p. 274.

Mitylene by France in 1900 :<sup>1</sup> the occupation was only for a week or two in each case. The French occupation of Siamese territory in 1893 was much more prolonged. All were alike unjustifiable and dangerous, except on the hypothesis of war.

In 1879 a Chilian ship, the *Amazonas*, cut out a Peruvian torpedo-boat, the *Alay*, in Ecuadorian waters. Protests were made by Ecuador, but in view of the possibility that she would not have been able to enforce the observance of neutrality upon the *Alay*, an expression of regret by the Chilian Government was accepted in 1886.<sup>2</sup>

In all these cases, there was an open and reckless violation of territory. There is a proceeding, almost as reprehensible, which consists in besetting the coasts of the recalcitrant power, and seizing any of its ships which put to sea. This is called a "blockade"; though it has few features in common with the war-measure bearing that name: and it approaches very nearly indeed to a violation of territory. It can hardly avoid involving an actual violation of territory: for the temptation is extremely great to enter the territorial waters and to take the ships that are there, if they will not venture outside. Sometimes it has been made to resemble closely an actual warlike blockade, when for particular reasons it has been inconvenient to admit that war actually existed. In such cases, not only the ships of the recalcitrant power, but those of foreigners communicating with the ports beset, have been seized. It is certain, at the present day, that such a proceeding as this, directed against third parties, can only be justified by the existence of war: and we may dismiss it from further consideration; only observing that it appears actually to have been resorted to on three occasions only

<sup>1</sup> *Supra*, pp. 237-8. See references there given, and *Arch. Dipl. (I.c.)*, 143.

<sup>2</sup> 82 S.P. 1289.

—the Granadan case of 1837, the Mexican of 1838 and the Argentine case of 1838-48, though it was threatened in the Turkish case of 1827, the Formosan of 1884, the Siamese of 1893.

In the other form—that of seizing the foreign state's own vessels—it is still open to grave objections on the part of third parties whose subjects may have goods on board or to whose flags the ships may have been transferred during the currency of the proceedings. Great difficulties were occasioned to the British during the Greek proceedings of 1850 on this ground, and possibly some just cause of complaint was given to foreigners. Passing over this objection by third parties, the seizure is said to be justified against the recalcitrant state on the ground of "reprisals." Reprisals are an antiquated and discredited survival of mediæval licence and unlaw. A sovereign whose subjects had suffered some unlawful damage simply helped himself to compensation at the expense of the aggressor's marine. That was a kind of rough justice: and it was well recognized that it must be strictly limited by the amount of the original wrong. The demand must be a clear and undeniable demand for a clear and liquidated sum, and the distress levied must be no more than is necessary to satisfy it.

That is a very different thing from besetting the coasts of a friendly nation and absolutely cutting off its home-borne trade unless it agrees to do what is demanded of it. Convenient such a course no doubt is. It avoids the *éclat* of war, and presents the demandant to the world in the light of a mild and gentle adversary—a sheep instead of a wolf. None the less is it an unheard-of innovation, insolent in assumption and illegitimate in execution. The sheepskin disguise deceives nobody.

Such "pacific blockades" have not even the poor justification of success. We do not say that uniform success would justify a nation in parading its warships in

sight of a foreign population and openly seizing on their vessels, in the confident assumption that they are too weak to resent it. It seems not only to be illegal, but to carry bad taste beyond the borders of insolence. But it is not amiss to point out, what is insufficiently recognized, that it does not succeed.

The arguments of those who see a new institution rising from the waters, which shall enable a state to get its way at no cost or inconvenience to itself, are singularly unconvincing. If it can be predicated of an institution, designed to avoid war, that it has led to war on ten occasions and attained its object bloodlessly in two, it will be admitted that it does not commend itself by results. The intolerable confusion into which it throws neutrals as to whether there is peace or war between two of their friends, is admitted even by its apologists. Neutrals are entitled to be assured that the vitally important line between peace and war shall not be blurred. It affects them too profoundly.

But the principal reason why "pacific" blockade is inadmissible is that it is one-sided. It is absurdly justified as a "mild measure" by persons who ought to be able to distinguish between lawful violence and illegal coercion. If a state goes to war, it accepts all the risks and responsibilities of war. It incurs the odium of breaking the peace of the world. Neutrals must not give it sixpennyworth of powder, nor allow it the free use of their ports. Its ships may be torpedoed—its commerce paralyzed. Its despised enemy may find unexpected allies. The resistance may be desperate. The conscience of the world may be stirred to fierce condemnation. All these things a nation will weigh. They will make it cautious.

Its rulers will remember Marathon, Morgarten, Bannockburn, Hochkirch, Saratoga, Baylen, Magersfontein. Constitutional difficulties may lie in their path. Senates, Law-Courts, Representatives, may have to be consulted if war is to be faced. All this has the wholesome result,

that nations think twice and thrice before they enforce their will on another land. And we are invited to dispense with every one of these checks, and to leave a nation free to work havoc on the trade of its adversary, in the name of " mildness."

Permission is graciously granted to the state thus attacked, to repel the attack by declaring war. But what weak state is likely to do so ? The offer is a simple mockery. The alternative presented is to submit to the blockade or to risk annihilation. The nation is invited to put up with an insolent demonstration of her weakness, or else to display a superhuman heroism. Is it replied that, if pacific blockades are disallowed, nations will go to war instead ? It is a false assumption : they will drop their trivial and dubious claims.

War is the expensive litigation of nations. It is well to introduce less expensive methods. But they are less than useless if they are absolutely one-sided. They are then not litigation ; but mere oppression. They are not a duel, but an assault.

It is surprising, in the face of the complaisant attitude of jurists, on how few occasions " pacific " blockades have been instituted, and on how very few they have been successful. We may certainly rule out those cases in which fighting has supervened. Not even the most sophistical rhetorician or Quaker would care to talk of " peacefully bayonetting " or " pacifically rupturing the pericardium " of an adversary. Mr. Balfour showed an accurate intuition when he replied to Mr. T. Healy, on the latter's inquiring if we were at war with Venezuela in 1902—" Does the hon. and learned gentleman suppose that without a state of war you can take the ships of another power and blockade its ports ? "—the language of mere good sense and candour. Mr. Balfour observed further that he thought it was very likely that the U.S. Government would think there could be no such thing as a pacific blockade, and



that he personally took the same view.<sup>1</sup> Lord Lansdowne's support to the same thesis has already been mentioned.<sup>2</sup> Sir E. Grey said, on 27 May 1909: "It is no good talking of peaceful blockade. Blockade is blockade (Hear, hear). It is the use of force. If you are to have blockade you must be prepared to go to war. . . . Do not let the House think that by smooth words such as by applying the adjective 'peaceful' to blockade, you are going to minimize what will be the ultimate consequences of the step you are taking."<sup>3</sup> Accordingly, the blockades which were intended to be consistent with peace, but which involved actual fighting or a state of war, can find no place in a list of "pacific" events. They are the Dutch blockade of 1832, which synchronized with the siege of Antwerp: the Mexican blockade of 1838, which was treated as war by Mexico:<sup>4</sup> the Argentine blockades of 1829 and 1838, which were treated as war by the Argentine:<sup>5</sup> the Ecuadorian blockade of 1858, which was treated as war by Ecuador:<sup>6</sup> the Neapolitan blockade of 1861 (Gaëta): the Siamese blockade of 27 July 1893, which was actually preceded by heavy fighting on the 13th and 14th:<sup>7</sup> and the Venezuelan blockade of 1902, of which the British Prime Minister's opinion is above cited.

Others ran out into measures of violence, and can only be claimed, in their pacific character, in the aspect of dismal failures. These are the Turkish blockade of 1827, which ended in Navarino: the Tagus blockade of 1831, which ended in the seizure of the Portuguese

<sup>1</sup> *Hansard* (4th Ser.), 1490, 1491.

<sup>2</sup> *Supra*, p. 241.

<sup>3</sup> *Times*, 28 May 1909 (3 c.).

<sup>4</sup> *Supra*, p. 105.

<sup>5</sup> And in the course of which, France captured an Argentine island. See 26 S.P. 961, 1024. Cf. pp. 96, 107, *supra*.

<sup>6</sup> See the Treaty of Peace, 50 S.P. 1086, by Art. 11 of which Peru agrees to make no claim "for the expenses of the campaign." (Signed 25 Jan. 1860.)

<sup>7</sup> 87 S.P. 303.

fleet as prize of war after mutual shots had been exchanged: the Uruguayan blockade of 1864, which led to the attack and capture by Brazil of Paysandu: the Formosan blockade of 1884, which led to the capture of the Tien-tsin forts by France after a sanguinary engagement: and the Cretan proceedings of 1897 (these indeed can hardly be called a blockade in any intelligible sense) which formed the *lever de rideau* for the Greco-Turkish war. The Tagus case was the subject of long debates in the British Parliament.<sup>1</sup> It appears that on 2 July 1831, the Fort of Cascaes<sup>2</sup> had an engagement with the French fleet, and Lord Granville was informed by Count Sebastiani that the French lost in the attack on Lisbon 3 killed and 11 wounded, being fired upon for ten minutes before replying.<sup>3</sup>

Others again are mere limited reprisals, which always have been, and still are, lawful. They are seizures of floating property made to a limited amount for a liquidated and indisputable claim—" *une dette claire et liquide*," Vattel says. It was no blockade, but an exercise of the right of reprisals, when Britain seized five Brazilian ships in 1862. Even these limited reprisals were termed "a violation of territorial sovereignty" by Brazil,<sup>4</sup> the prizes having been made and kept in territorial waters. On that ground, diplomatic relations with Britain were broken off.<sup>5</sup>

Others failed to attain their object. Thus the Argentine blockade of 1838 by France (if its pacific character be admitted) resulted in the recognition of Rosas: and that of 1845 by France and England ended in those countries agreeing to salute the Argentine flag. In the Granadan case of 1837, the prisoner had been liberated

<sup>1</sup> See *Hansard* (3rd Ser.), V. 275, 398; VI. 99, 1103, 1110. Cf. Atherley-Jones, *Commerce in War*, 107-109.

<sup>2</sup> 18 S.P. 388.

<sup>3</sup> *Ib.* 409.

<sup>4</sup> 54 S.P. 799, Abrantes to Moreira, 8 Jan. 1863.

<sup>5</sup> *Ib.* 841.

17 days before the reprisals commenced : and they were abandoned as soon as the fact became known.

Two, though not involving any formal assertion of belligerency, are officially admitted to have amounted to war. The Argentine blockade just referred to drew the following remark from Palmerston—"The real truth, though we had better keep it to ourselves as much as possible, is, that we have been at war with Rosas all along."<sup>1</sup> As to the Greek measures of 1850, they are styled "hostilities" in the semi-official *Letters of Queen Victoria* (II. p. 277, note), edited by Viscount Esher. They proved the occasion of the final loss by Palmerston of Her Majesty's confidence, and they caused the French and Russian Ministers to leave London.

Others were *soi-disant* blockades of a coast by the authority of the territorial power. Needless to say, a power cannot blockade ports in its own peaceable possession, nor can it authorize other powers to do so. Blockade is a war right. Operations of this kind, which, whatever else they were, were certainly not blockades at all, were carried on by Spain in the Sulu Islands in 1873,<sup>2</sup> by Germany and Britain in East Africa in 1889, and by the Six Powers in Crete in 1893.

The East African case of 1889 above mentioned presented some features worthy of *opéra bouffe*. The Sultan of Zanzibar, by whose authority they were supposed to be instituted, violently protested against the whole proceedings and appealed to the divine clemency to judge between him and the Anglo-German blockading fleet. A good deal of the "blockaded" territory was in the peaceable possession of the blockaders: and the "blockade" was limited to certain articles—viz. slaves and munitions of war. Any one of these curious features was of course sufficient to invalidate the measure

<sup>1</sup> See his *Life* by Dalling, III. 327. He added that, without war one cannot even stop one's adversary's own ships.

<sup>2</sup> 73 S.P. 932, 954.

utterly and completely as a blockade: and in fact, France had to be invited graciously to allow her dhows to be searched by the *soi-disant* blockaders. When, indeed, the German Admiral began stopping provisions, he justified it as "a war measure," and quite "independent of the blockade": showing thereby that he considered the latter to be no blockade at all.

There remains a pitiful harvest of one or two "blockades" where no violent hostilities followed, and where substantial redress was obtained. These were the Greek blockades of 1886 and (perhaps) of 1850. The benefits accruing from the former, indeed, are not very obvious. It staved off war, for the moment, but it embittered Greek feeling, and did not prevent the final catastrophe of 1897. The other proceeding, Palmerston pathetically protested again and again, was "not a blockade": there is no doubt he was right, and equally little doubt that his proceedings were wrong. The government was censured for them in the House of Lords, and only saved by its party majority in the House of Commons.

Pacific Blockade has not even the merit of modernity. It is early Victorian, and particularly characteristic of the age of Louis Philippe. From the Argentine case of 1845 to the Formosan one of 1884, there is not a single instance of its operation.<sup>1</sup> It has had an attraction for recent writers, such as Hall: but contemporaneous writers condemned it cordially. "Their minds were fixed on its earlier form,"<sup>2</sup> observes Hall in a mood of reminiscent clairvoyance. But Hautefeuille, who invented the name of "pacific blockade," puts it carefully on record that *as between the attacking and attacked power*—"je ne puis concilier l'idée de paix et d'amitié avec celle de blocus";<sup>3</sup> and he has nothing but condemnation

<sup>1</sup> Except the negligible cases of Ecuador, Uruguay and Gaëta.

<sup>2</sup> *i.e.* affecting neutral vessels. See the opinions collected, *Law Magazine and Review* (1896), 285.

<sup>3</sup> *Droits des N.N.*, III. 179.

for the blockade of 1827, although "il n'eut aucun effet sur les peuples neutres."<sup>1</sup> Nor, writing at the time of the American Civil War, did he see any cause to modify his view even though the more recent practice of 1850 was fresh in mind.

Cauchy is still occasionally cited as a supporter of pacific blockades, on the strength of an innocent approval of blockade as a self-sufficient war measure. Probably this is not the last time when a denial that he considered blockades possible in peace-time will be necessary.

We have seen that the ships of third powers cannot be affected by such proceedings. Lübeck protested against the notion that her ships could be seized, in 1838.<sup>2</sup> But it is not only from the point of view of third parties that such a step is improper. As a forcible interference with her commerce, cutting her off from all commercial intercourse with the rest of the world, it would be an injury to the state attacked, greater and yet more unlawful than the flagrant injury of seizing her own ships.

That a blockade cannot affect neutrals in the absence of war, British statesmen have laid down again and again. Thus Lord Russell in 1864<sup>3</sup> informed the Minister at Rio that—"it was competent to the Brazilian Government, in order to obtain justice for wrong inflicted upon its subjects, to have recourse to reprisals against the Republic of Uruguay; but it was not competent to the Brazilian Government to stop, visit, or take any cargo whatever out of, neutral vessels, as a subsidiary means of accomplishing that end. This right of interfering with the commerce of the neutral is incident, and incident only, to a state of war. . . . It was of course competent also for the Brazilian Government, in declaring war, to announce a blockade also in due form in the

<sup>1</sup> *Histoire*, p. 338.

<sup>2</sup> See *Annuaire de l'Inst.* (1887), 292

<sup>3</sup> 66 S.P. 1208, Russell to Lettsom, 24 Dec.

exercise of belligerent rights. You will ascertain and report to me by the first opportunity whether Brazilian sea and land forces are exercising a right of reprisals without war, or are acting under orders to make war ; and if making war, whether with or without a blockade ; and if with a blockade, within what limits."

So Granville, in 1884,<sup>1</sup>—" The contention of the French Government, that a ' pacific blockade ' confers on the blockading power the right to capture and condemn the ships of third nations for breach of such a blockade is opposed to the opinions of the most eminent statesmen and jurists of France, and to the decision of its tribunals, and it is in conflict with well-established principles of International Law. H.M. Government consider that the hostilities which have taken place, followed by a formal notice of blockade, constitute a state of war between France and China."

On the occasion of the 1850 " blockade "—a singular idea, that the Piræus should be blockaded, when the commerce of all nations was constantly arriving and departing there !—Brunnow wrote to Palmerston—<sup>2</sup>

" J'ai jugé nécessaire de demander à votre Excellence l'explication d'un fait dont il m'était impossible de méconnaître la gravité. . . .

" Si la Russie ou la France, sans entente préalable, sans communication aucune faite à l'Angleterre, envoyait une escadre au Pirée à l'appui d'une réclamation française ou russe ; mettait les côtes de la Grèce en état de blocus ; arrêtaient les bâtiments sous pavillon grec, en un mot *menaçait le repos d'un royaume* dont l'indépendance a été placée . . . sous la garantie des trois puissances, je n'hésite pas à dire que vous seriez le premier, milord, à regarder ces actes comme gravement compromettants pour la sûreté de l'état dont la Grande Bretagne elle-même est l'une des puissances garantes."

<sup>1</sup> 76 S.P. 426, 429, 430, Granville to Waddington, 11 and 26 Nov. 1884.

<sup>2</sup> 39 S.P. 499, 22 Jan. (5 Feb.) 1850.

Lord Palmerston had told him that the measure was one of mere reprisals, designed to secure satisfaction for definite and limited claims. But Brunnow was not to be deceived by words.

“Je vous ai représenté, milord, que le blocus dépasserait, à mon avis, la limite où les représailles, telles que vous les entendez, toucheraient à l'état d'hostilité envers la Grèce.

“ . . . Quel que soit le motif qui serve de base aux réclamations que vous mettez à la charge du Gouvernement hellénique, la valeur de l'objet dont vous demandez réparation n'est-elle pas en disproportion manifeste avec la rigueur des mesures que vous avez adoptées pour arriver à la satisfaction requise, dans la situation donnée ?”

And Nesselrode, concurring, wrote—<sup>1</sup>

“ Votre Excellence se fera difficilement une idée de l'impression profondément pénible qu'ont produite sur l'esprit de l'Empereur les actes de violence inattendus auxquels les autorités britanniques viennent de se porter contre la Grèce. . . . En pleine paix, sans qu'aucun indice précurseur des intentions du Gouvernement anglais ait été seulement donné, la flotte anglaise vient se poster à l'improviste en face de la capitale de la Grèce. L'amiral Parker, accueilli amicalement par le roi Othon, déploie dès le jour suivant, vis-à-vis de ce souverain une attitude comminatoire. De la veille au lendemain on charge en ultimatum impérieux des réclamations de peu d'importance relative, qui se poursuivaient depuis des années, et dont quelques-unes se trouvaient déjà en voie d'accommodement. Le ministre de l'Angleterre déclare qu'il ne s'agit plus de les discuter, d'en examiner le juste ou l'injuste, mais qu'il y faut satisfaire pleinement dans le terme de 24 heures, et ces 24 heures écoulées, le Gouvernement grec n'ayant pu se résoudre à plier sous ces conditions humiliantes, le blocus des côtes de la Grèce est établi, et l'on frappe immédiatement de saisie les bâtiments helléniques.

<sup>1</sup> 39 S.P. 613, Nesselrode to Brunnow, 7 (19) Feb. 1850.

"Chacun est juge de sa dignité, et ce n'est pas à nous qu'il appartient de contester au Cabinet anglais la manière dont il croit devoir envisager et comprendre la sienne; l'Europe impartiale décidera en combien les moyens qui viennent d'être pris convenaient à une grande puissance comme l'Angleterre vis-à-vis d'un état faible et sans défense, . . .

"L'Empereur vous charge, d'adresser sur ce sujet des représentations sérieuses au Gouvernement anglais, en l'engageant de la manière la plus pressante à accélérer à Athènes la cessation d'un état de choses que rien ne nécessite et ne justifie, et qui expose la Grèce à des dommages comme à des dangers hors de toute proportion raisonnable avec les griefs qu'on met à sa charge."

And he adds that the position of all powers with a long sea-coast, be they powerful or weak, is gravely disturbed by a measure which would put it into the power of the sovereign of the seas to resort to arbitrary force as and whenever convenient.<sup>1</sup>

Even where there is an admitted right of interference in the foreign territory, in the nature of a *jus in alieno solo*, the difficulties of the situation are intolerable.

The difficulties which attend ex-territorial conceptions nowhere exhibit themselves to better advantage than in the case of Newfoundland.

Both France and the United States have claimed such rights of entry on the Newfoundland coast; and the United States claim them also in Labrador. We may deal with the American claims first. Throughout the discussion, indeed, the British case is that these were not rights in the soil—fragments of the sovereignty over Newfoundland or Labrador—at all. The British view is that they were merely British promises, which must be enforced, if at all, through British force. On the other view, the rights of access to the coasts, conferred on

<sup>1</sup> See also W. P. Pain (*Law Magazine and Review*, Febr. p. 196) and Atherley Jones (*Commerce in War*, 105-116) on the whole topic of pacific blockade.



United States by the Peace of Paris, ceased on the outbreak of the war in 1812, when every other British promise became invalid. If, on the other hand, they were "real" rights, the restoration of the *status quo* in respect of territory in 1814 replaced them where they were. This illustrates the root-difficulty; but it is not practically important, because a new treaty was negotiated in 1818, which is the basis of all subsequent discussion. Reciprocity treaties (of 1854 and 1871) dealt with the matter in connection with the general fisheries of British North America and the United States. But the latter treaty was revoked in 1885. The situation had become exasperated by the clash of territorial rights.

On 6 Jan. 1878, according to the information of the U.S. Minister, mobs of sixty to two hundred persons attacked the fishing vessels at Fortune Bay, cut their nets, threw out their catch, and necessitated the return home in ballast of the boats, which thus lost their voyage and the season's profits.<sup>1</sup> Lord Salisbury justified this under the local law: but the whole question was, whether the local law applied, or whether the Massachusetts fishermen, acting in pursuance of treaty rights of a "real" character, were not ex-territorial. The local law prohibited using seines, Sunday fishing, and "barring" fish: and they had done all three. Their answer was that they had nothing to do with the local law, which might conceivably impose any number of restrictions upon fishing, and that they were exercising an international right which the local law could not limit or affect in any way. Mr. Evarts' brilliant despatch of 28 Sept. 1878,<sup>2</sup> lays this down convincingly. Lord Salisbury could only reply that if American fishermen were to break the local law because they believed it contrary to treaty, Newfoundlanders might violently restrain them in the opposite belief, and—"nothing but

<sup>1</sup> 72 S.P. 1266, Welsh to Salisbury, 19 March 1878.

<sup>2</sup> *Ib.* 1269, Evarts to Welsh,

confusion and disorder could result." The British Government therefore, he added, preferred to consider that the local law was supreme, treaty or no treaty ; if contrary to treaties, it should form the subject of diplomatic complaint.<sup>1</sup> Obviously, this is the convenient course : the point is, is it all that the United States had secured by the solemn grant of an apparent *jus in alieno solo* ? Lord Granville<sup>2</sup> agreed with Lord Salisbury that it was : that the grant of fishing rights was to be understood subject to all " reasonable regulations to which British fishermen are subject." He did not, however, defend the Newfoundlanders—(as Lord Salisbury appeared to have been inclined to do)—for taking the law into their own hands, and he agreed to indemnify the victims of their violence. Lord Salisbury had refused this concession, but the offer of £15,000 by Lord Granville was now accepted by the United States.<sup>3</sup> It was of course made solely on the ground of the mob violence : and it is thus an admission, for what it is worth, of the liability of a government for the unexpected acts of riotous mobs in a remote colony. The reservation is made—" for what it is worth " ; for the payment was placed on that ground for convenience, and to veil the real matter in dispute, which was the subjection of Massachusetts citizens to the colonial law.

An even more dangerous situation was created *vis-à-vis* France. By the Treaty of Utrecht, she was granted the privilege of actually erecting huts for drying fish on the Newfoundland shore. The French proceeded to erect canning factories. It is readily seen what complications result. Could the right of private owners interfere with the advantages granted by the treaty ? Obviously not : there would have been little point in a mere permission to the French to build huts where they

<sup>1</sup> 72 S.P. 1275, Salisbury to Welsh, 7 Nov. 1878.

<sup>2</sup> *Ib.* 1298, Granville to Lowell, 27 Oct. 1880.

<sup>3</sup> *Ib.* 1308, 1321. They had claimed £24,000.

could obtain leave to do so. That would have been an undertaking similar to those contained in commercial treaties, and merely amounting to a promise not to put public obstacles in the way of French people who wished to erect huts. It must have meant more than this: for in 1783 it was expressly provided that British settlements would be removed from that coast if they should be formed. The development of the coast (which was rich in minerals) was thus entirely put an end to. Had the French Government asserted the claim that their subjects were free from Newfoundland jurisdiction and law while engaged in the exercise of their summer rights, the situation would have been almost equivalent to an alternate French and British occupation of the district, recalling the celebrated arrangement concerning Persephone. They did in fact assert, and sustain, the claim (similar to that of the United States) that they could carry out the provisions of the treaty for themselves, and were not reduced to claiming damages against Britain if they should be refused access. And, *de facto*, the French fishery cruisers alone exercised jurisdiction over the fishermen who landed on the Newfoundland coast.<sup>1</sup>

When the case became acute, in 1886,<sup>2</sup> the French officers were instructed to disregard the jurisdiction of the local judicial officer during the fishery season. Lord Rosebery says that he—"cannot refrain from deprecating particularly the claim put forward by [the French] government to ignore during the fishery season the territorial jurisdiction flowing from the sovereign rights of the British Crown over the whole of the island." Nevertheless, the French officers seized fishing gear belonging to British subjects on various occasions: they were restored as a concession.<sup>3</sup> In 1888<sup>4</sup> they forcibly pre-

<sup>1</sup> 79 S.P. 1176.

<sup>2</sup> *Ib.* 1185, Rosebery to Waddington, 24 July 1886.

<sup>3</sup> *Ib.* 1191.

<sup>4</sup> *Ib.* 1215.

vented the erection of a factory by British subjects : Salisbury characterized this as quite indefensible : but Waddington held <sup>1</sup>—" que le droit de la France sur la côte de l'île de Terre-Neuve réservée à ses pêcheurs n'est autre chose qu'une partie de son ancienne souveraineté sur l'île qu'elle a retenue, en cédant le sol à l'Angleterre, mais qu'elle n'a jamais ni infirmée ni aliéné."

The great controversy which then arose as to the piscine nature of the lobster, and as to the propriety of regarding lobster-canning factories as covered by the permission to erect huts for drying fish, need not detain us. Lord Salisbury, by a minute examination of historical records and the language of the Treaty of Utrecht,<sup>2</sup> fairly rebutted the French theory of an original French sovereignty whereof the retained fishery formed a fragment. While he was penning his despatch, the French gunboats *Drac* and *Bisson* were taking up British lobster-traps, in the neighbourhood of H.M.S. *Emerald*,<sup>3</sup> and the British commander was ordering their replacement.<sup>4</sup> Mr. Waddington details<sup>5</sup> the particulars in which the lobster-fishing of the British firm interfered with French operations. They took up space : they frightened the cod-fish. He adds that it is not correct to say that redress must be claimed through Britain and that France cannot enforce her rights directly :

" Des droits réels, tangibles, nous ont été concédés par les traités ; nous avons la faculté d'en user en toute liberté sans interruption ni trouble. Qu'un cas de trouble ou de gêne se produise, nul que nous n'est en situation de l'apprécier." This Lord Salisbury thought " novel and dangerous " <sup>6</sup> doctrine, persistently declining to admit the possibility of " real " rights *in alieno solo*.

<sup>1</sup> 79 S.P. 1232, Waddington to Salisbury, 7 Dec. 1888.

<sup>2</sup> 81 S.P. 949, Salisbury to Waddington, 9 July 1889.

<sup>3</sup> *Ib.* 969, 970.

<sup>4</sup> 82 S.P. 998. <sup>5</sup> *Ib.*, Waddington to Salisbury, 5 April 1890.

<sup>6</sup> *Ib.* 1000, Salisbury to Jusserand, 29 May 1890.

In 1885 Great Britain occupied Port Hamilton.

"Under ordinary circumstances," said Lord Granville,<sup>1</sup> "H.M. Government would have desired to have come to a previous understanding with the Chinese Government on the subject. But in view of the probable occupation of these islands by another power, H.M. Government have" dispensed with that formality. Japan was concerned to learn the news,<sup>2</sup> but the power most interested was neither the suzerain nor the neighbour but the territorial nation—Corea. China was offered the payment by Britain of the Korean tribute in respect of Port Hamilton—but as Russia and Japan appeared likely to follow the British example if any countenance was shown to it, the offer was declined.<sup>3</sup> Corea sent officers to protest on the spot,<sup>4</sup> who inquired "by what authority and on what grounds this military occupation of a portion of the territory of a friendly power has been undertaken by the naval forces of Her Britannic Majesty." And the Korean Foreign Minister<sup>5</sup> declared that Port Hamilton—"is a possession of my government which no other country has the right to trespass upon. . . . It is inconceivable that a government like that of Great Britain, which attaches importance to the obligations of comity, and has a clear perception of the requirements of International Law, should act in a manner so unexpected."

A very difficult situation was thus created. Other powers were ready to help themselves to Korean territory if the seizure should be legalized. Lord Salisbury temporized, pleading the November elections. When they were over, he asked if China would guarantee that no one else should step in if Britain withdrew.<sup>6</sup> China at first answered that it was not her practice to interfere with her vassals in their territorial arrangements.<sup>7</sup>

<sup>1</sup> 78 S.P. 143, Granville to Tséng, 16 April 1885.

<sup>2</sup> *Ib.* 144.

<sup>3</sup> *Ib.* 147.

<sup>4</sup> *Ib.* 149, 151.

<sup>5</sup> *Ib.* 153.

<sup>6</sup> 78 S.P. 157.

<sup>7</sup> *Ib.* 158.

Eventually, on receiving satisfactory assurances from Russia, she consented to give the required undertaking.<sup>1</sup> On 27 Feb. 1887 the flag was hauled down. As a matter of fact, the Admiralty held that the place would be only an incubus unless converted into a first-class fortress.

The occupation was of course utterly and flagrantly illegal. The only excuse was the old excuse for seizing the Danish fleet—that if we did not take it, somebody else would. Such attempted justifications are without weight. It is better candidly to admit that the law has been broken, and that the whole discussion is removed into the sphere of morals. And on that exalted plane, enlightened selfishness is very difficult to justify.<sup>2</sup>

The formation of the British North Borneo Company was the occasion of disputes with Holland and Spain. But as they turned on the construction of treaties, it will not be necessary to go very closely into their details. The highly important point nevertheless arose of the application of commercial treaties to protectorates. One very potent argument which leads modern governments to prefer protectorates or leases to annexation, interchange of notes to treaties and “pacific” blockades to war, is that under cover of an apparently novel institution, they may escape the natural and necessary consequences of their acts. Annexation involves the investment of the population with the quality of subjects, entitled to the constitutional rights of subjects. It involves the incorporation of the territory with the national territory, bound by the terms of treaties. Neither of these results is very convenient to a state which wants to have a free hand ;—just as the declaration of war is not con-

<sup>1</sup> *Ib.* 163, Walsham to Iddesleigh, 5 Nov. 1886.

<sup>2</sup> A possible ground of legal justification is the abnormal position of Corea, absolutely without an effective voice in her own affairs, and swayed by the alternate influence of one foreign power after another. But this was hardly her position so early as 1885.

venient to a nation which only wants to get its own way by force, without embarrassment by neutral caution or constitutional difficulties.

Consequently, Great Britain thought she saw her way to pegging out a claim in North Borneo, which other countries would have to respect, but in which they could claim no treaty rights. Lord Granville went so far as to admit to the Dutch negotiator that an actual protectorate might alter the position:—but we were only chartering a Company! <sup>1</sup>

Holland and Britain had in 1824, by the Treaty of London, agreed "to admit the subjects of each other to trade with their respective possessions in the Eastern Archipelago and on the continent of India, and in Ceylon, upon the footing of the most favoured nation. . . ." <sup>2</sup> and that "no treaty hereafter to be made by either, with any native power in the Eastern Seas, shall contain any article tending" to exclude the trade of the other. <sup>3</sup> And Britain engaged to form no establishment on the islands south of Singapore Straits: and that no treaty should be concluded by British authority with their chiefs. <sup>4</sup>

Considering that the North Borneo Charter confirmed to the Company the grant by which the Sultan of Borneo <sup>5</sup> nominated Baronde Overbeck Supreme Ruler of certain extensive territories, "with power of life and death over the inhabitants . . . with the rights of making laws, coining money, creating an army and navy, levying customs . . . and all other powers and rights . . . belonging to Sovereign Rulers," Lord Granville's contention seems futile in the extreme. Baron de Sandenburg submits the situation to an acute analysis <sup>6</sup> in an able despatch; but Granville was able to convince his successor that the

<sup>1</sup> 73 S.P. 1071, Granville to Stuart, 21 July 1880.

<sup>2</sup> Art. 1.

<sup>3</sup> Art. 3.

<sup>4</sup> Art. 14.

<sup>5</sup> 73 S.P. 1082 (29 Dec. 1877).

<sup>6</sup> *Ib.* 1087, Sandenburg to Bylandt, 11 Aug. 1881.

Company's operations would have no political operation.<sup>1</sup> At the same time it is more than ludicrous to find the Foreign Secretary laying down in the compass of one and the same despatch, that "there was no question of a British Protectorate," and that "the Company offered [and agreed] to *submit to the control* of H.M. Government in the exercise of the powers derived from the Sultan."<sup>2</sup>

The Spaniards were a little later in taking action. Their ground was the different one, that the Sultan of Sulu as a vassal of Spain had no right to cede his territory to the Company.<sup>3</sup> Into this contention of suzerainty it is unnecessary to enter.

The Egyptian military revolt of 1881 produced natural difficulties with Turkey, who saw an opportunity of regaining her lost control over the Nile Province. Lord Dufferin (it is hard to think he did so without irony) disclaimed any wish on the part of the Dual Control to put upon the Sultan's sovereign rights in Egypt any restrictions beyond what was imposed already by treaty.<sup>4</sup> The Sultan, nevertheless, to the great disgust of the Western powers, particularly France, sent an emissary to Cairo, and Great Britain and France promptly followed by sending ironclads to Alexandria, ostensibly for the protection of their subjects in the disturbed circumstances which they assumed could alone render the Sultan's action necessary.<sup>5</sup> Lord Granville<sup>6</sup> reiterated the value of the Sultanic tie as a bulwark against the ascendancy of any one power in Egypt.

The situation in Egypt was legalized by a Convention with Turkey of 24 Oct. 1885.<sup>7</sup> But an uneasy feeling constantly existed which found expression in demands that a date should be fixed at which the British troops

<sup>1</sup> 73 S.P. 1094. <sup>2</sup> *Ib.* 1054, Granville to Morier, 7 Jan. 1882.

<sup>3</sup> *Ib.* 1048. <sup>4</sup> *Ib.* 1142, Dufferin to Granville, 19 Sept. 1881.

<sup>5</sup> 73 S.P. 1155, Dufferin to Granville, 11 Oct. 1881; 1157, Granville to Dufferin, 14 Oct.

<sup>6</sup> *Ib.* 1160 (4 Nov. 1881). Cf. *supra*, p. 184. <sup>7</sup> 76 S.P. 442.



should be withdrawn. Salisbury now laid it down for the first time<sup>1</sup> that if the British went, they would reserve the right to come back. "Other nations would not permit the solvency of Egypt to be destroyed by anarchy"—and (without showing why she could not rest content in that belief) Great Britain must retain the right to step in first, and to guard the state of things brought about by her large sacrifices. The arguments are mutually destructive. If all Britain wanted was to secure Egypt's solvency, and if it was certain that some power or other would see to that—why should Britain be so particular about reserving a right of re-entry?

A fresh Convention, fixing a three years' limit to the occupation, with right of re-entry, was negotiated in 1887 with Turkey. France and Russia then represented to the Porte the probability that they would respectively feel obliged to do good in Armenia and Syria, if the Convention went through. Thus the experience of China and Corea was repeated by Turkey and Egypt.<sup>2</sup>

The Sultan, by his Investiture of 27 March 1892,<sup>3</sup> renewed his declaration that the Egyptians were his subjects, and that the Egyptian flag must be the same as the Turkish.

We shall do no more than mention the great difficulty which derogation from the principle of territoriality occasions in the case of the Suez Canal (see 79 S.P. 533 *et seq.*).

A remarkable and peculiar case of territorial confusion is presented by the case of the Portuguese privileges in Surat.<sup>4</sup> These mercantile concessions, granted by the

<sup>1</sup> 78 S.P. 1063, Salisbury to Wolff, 15 Jan. 1887.

<sup>2</sup> *Ib.* 1108, Wolff to Salisbury, 11 July 1887.

<sup>3</sup> 84 S.P. 637.

<sup>4</sup> 68 S.P. 1277. Leases and reversions, though not unknown to the older law, are another source of difficulty. Who are responsible for the use made of, and who is entitled to complain of injuries done to, the leased territory?

Mogul Emperors, were long respected by the British, but were eventually found to be productive of more difficulties to Great Britain than they could be of advantage to Portugal. Britain therefore revoked them, and the Portuguese contended that this was an actual invasion of rights which existed independently of the British government. If the privileges were treaty concessions, granted by the native ruler, they disappeared with him. If they were "real" rights, conceded by him as territory might be ceded, they existed thenceforth independently of his fate. Had he ceded a castle or a fort at Surat, it would have been as inviolable as Goa or Pondicherry. If his concession of privileges was more than a mere matter of contract, it would be equally unaffected by future events. And the contention that they were so produced a most awkward and difficult situation. The existence of "real" rights, other than the ownership of territory, is inevitably the occasion of confusion.

Another awkward case of territorial complications was the reservation of autonomy to the Mosquito Indians when Great Britain recognized their territory as belonging to Nicaragua.<sup>1</sup> Differences arose between Nicaragua and Britain which were submitted in 1890 to the arbitration of the Emperor of Austria.<sup>2</sup> That sovereign gave his award to the effect that—(1) the sovereignty of Nicaragua is not full and unlimited within the given area, but limited by the autonomy of the Indians; (2) the flag of Nicaragua may, however, be flown throughout that area; (3) and a commission appointed to protect Nicaraguan "sovereign" rights therein; (4) nor must the Mosquito flag be flown there without some recognition of Nicaraguan suzerainty; (5) grants of rights to take natural products there can only be made by the Mosquitos; (6) and they alone can regulate their trade; (7) and in particular Nicaragua cannot fix a tariff for Greytown.

<sup>1</sup> Treaty of Managua, 50 S.P. 96 (1860).

<sup>2</sup> 72 S.P. 1212.  
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In point of fact, it was the mixed community at Greytown, and not the Indians at all, who were concerned with the international validity of the rights reserved to the Mosquitos. The United States, in 1889, supported Nicaragua in the assertion of a right to establish post-offices and military stations at Greytown and elsewhere. "Such a right is an essential incident of paramount sovereignty, and can properly be exercised by no other agency. . . . If the Republic of Nicaragua is to be limited to the mere formal right of hoisting a flag and maintaining a commission within the Reservation, how can it be called upon to perform any of its international obligations?"<sup>1</sup> We have elsewhere referred to this controversy.<sup>2</sup>

In 1895 a British admiral occupied for a week the custom-house and port of Corinto.<sup>3</sup> The difficulty arose, as usual, in the Mosquito Reserve. The Nicaraguans began to enforce their sway in that district, and arrested and expelled nineteen British subjects on the ground of complicity in riot. Lord Kimberley claimed £15,000, in a rather peremptory way (for the British had not been hurt), and refused arbitration. The quasi-independence of Mosquito was, of course, threatened by the Nicaraguan action. Honduras mediation brought about a settlement. But hardly was it concluded, than Nicaragua repaid herself handsomely by incorporating the Mosquito territory absolutely in her dominions.

The Mosquito question was "definitely" settled by the Brito-Nicaraguan treaty of 1905.<sup>4</sup> The absolute sovereignty of Nicaragua is recognized, and the Mosquitos are practically thrown over. Though secured for fifty years from military service and all taxation, they are subjected to the Nicaraguan laws.

<sup>1</sup> 81 S.P. 746, Bayard to Phelps, 23 Nov. 1888.

<sup>2</sup> *Infra*, p. 294(n).

<sup>3</sup> *U.S. Dipl. Corr.* (1895), 1025. See p. 251, *supra*.

<sup>4</sup> *For. Rel. U.S.* (1905), 703.

According to Roosevelt,<sup>1</sup> the Treaty of 1846 (United States and Colombia), Art. 35, which guaranteed a right of way to the former across Panama, "vested in the United States a substantial *property* right carved out of the rights of sovereignty and property which New Granada then had and possessed over the said territory." And in defence of this "real" right, troops were landed, and acts of authority done, at various times in 1902 and 1903.<sup>2</sup> Prior to that date, the States had only interfered in aid of, and with the assent of, Colombia. The effect of the interference was to prevent Colombia from suppressing insurrection.

Enough has been said to indicate that, as the world is at present organized, the only alternative to the firm preservation of the absolute sanctity of territory, inland and coastal, is anarchy, which could not be long delayed if such events as we have remarked were to become recognized as regular. At present they are nothing more formidable than the thin end of a wedge. It is very certain that there is a thick edge behind it. Any one who has no admiration for a universal scramble for advantages, backed by force of arms, indiscriminately all the world over, must feel the necessity of allowing no reasons of immediate convenience to serve as excuses for the forcible exercise of so-called "peaceable" force in a neighbour's territory, or off his coasts.

<sup>1</sup> Message, 7 Dec. 1903.

<sup>2</sup> Moore, *Digest*, III. § 344.

## CHAPTER VII

### STRATIFICATION

BUT, though "territoriality" is the magic word of the modern state, forgetting which it will crumble away like the palace of an Arab djinn when its controlling spell is withdrawn, it is not the only possible basis of social organization. The careless infringement of territory by a state whose very existence depends on the security of the territorial principle is suicidal and anarchical. But that is a conclusion *pro loco et tempore*. We have nothing at present to put in the place of the territorial principle.

There has never been a time when there has not existed some organization cutting across the boundaries of national limits. The Orthodox Catholic Church is a more powerful political force than the mushroom kingdoms of the Balkans. The Roman Catholic Church through the mediæval ages shot the glittering threads of its high ideals through the rough warp of feudal life. Orders of chivalry such as the Knights Templars stretched their branches into many lands. In Julius II.'s time the envoys of the Grand Master of the Knights of Rhodes claimed and obtained audience at the court of Rome as a sovereign's ambassadors.<sup>1</sup> In the old Hellenic days cults united their votaries from different cities. In the dark ages, society was definitely organized on a racial and not a territorial basis. Hun, Burgundian and Italian in Italy enjoyed different laws.

<sup>1</sup> Nys, apud *Rev. de D.I.* (1893), 517.

And in our own time we are confronted with the patent fact that the strongest political force which is displaying active energy is frankly anti-national, and consists in the organization of class-interests.

The force which seeks to abolish the extremes of poverty that fester in the towns of modern countries, by subjecting the individual to the absolute dictation of an elective authority, we shall call for brevity socialism. From the first it has aimed at "Internationalism"; and its earliest formidable propaganda was known as "The International." The solidarity of interest of the classes engaged in manual labour in all countries is emphasized by its leaders. Their unity, and their omnipotence in realizing that unity, as against the classes who, to use a favourite catch-word of the party, "exploit" them, is a commonplace of the literature of the movement. The necessary consequence will inevitably be the organization of the threatened classes as classes, and independently of territorial distinctions. Nor will the stratification stop there. The quarrel is not between the mass of the manual labourers on the one hand, and the bankers, civil servants, shopkeepers, professional people, land-owners and funds-holders on the other. The artificer earning £2 or £3 a week is in a different position, and must inevitably take a different attitude, from that of the poorly paid carter or hodman. The regularly employed, if poorly paid, labourer in a provincial district is in quite another situation than the casual labourer in a large town. The casual labourer's interests are not those of the submerged population who live partly on chance earnings, partly on charity and partly on nothing. On the other hand, the clerk's interests are diverse from all of these: while the small shopkeeper's, who makes ends meet on a net profit of £50, are much more like the labourer's than those of the tradesman with a turnover of £5,000. The manager and the London shopwalker have another set of interests; the higher

Civil Service is in many respects antagonistic to the merchant; and besides all these there is the army of artists, musicians and designers, whose position in a socialist state managed from the bottom—(or even from half-way up)—would be one of considerable delicacy. Services in such a state would have to be reduced to a common denominator. A difficult process at best, this would have to proceed on materialistic and obvious lines. It could never give due weight to the truth that “maidens gathering hawthorn in May” are doing as much—nay, much more—real service to the community than the miner in the cavern or the cook in the kitchen. The common sneer against the non-workers is without point, when it arraigns them for not “producing.” It is equally applicable to the artist and the philosopher. The leisured classes are artists in conduct. It is their function to set a standard of beauty and refinement which shall act as a stimulus and an inspiration to the whole community. This justifies their high wages: and it is only when they abandon their duty, and, leaving refinement for vulgarity, and consideration for tactlessness, they become no longer an example of manners, that they arouse the abhorrence of the mass.

Some of these strata may, and probably will, under pressure coalesce. At the same time there is every probability that the literal class warfare of the future will not be a warfare between the poor and their sympathizers on the one hand and the well-to-do on the other: it will be a conflict of a much more complex sort; in which whole sections of the world’s population may at times remain neutral.

There are things less likely than that the old struggle of Catholic and Protestant may be repeated, and that the lay Catholicism which is the brain-matter of socialism may capture whole states for its purpose;—so that we might see a socialist England, Germany and Russia con-

fronting an individualistic France, America and Austria. It is more likely that the conception of territorial states will fail to stand the strain. Apart from superficial sentiment, the tie of nationality is rapidly weakening. "We have accustomed ourselves," says Montague Bernard, "to divide society into classes rather than into peoples, and to study the component strata more than the superficial plan."<sup>1</sup> To the denizen of a bygone age his country meant to him a magnified copy of the district where he was born and bred, and which he knew to the finger-tips; in whose life he was steeped, as his ancestors had been. He did not *know* the rest of the country: he *pictured* it as an extension of his own neighbourhood which he knew and loved. His country was near his heart as an *eidolon* of his home. Now, he travels about it far and wide: he finds himself a stranger everywhere in its borders. The Northumbrian meets no more kind and friendly people in Dorset than he does in Normandy; none pleasanter in Ramsgate than in Christiania. Every class travels and tramps—and finds England a strange country.

Stratification, therefore, seems likely to exert its principal influence, not in capturing states for particular classes and so creating "faults" in the strata, but in breaking states up. It is impossible to ignore the significance of the international congresses, not only of socialism, but of pacificism, of esperantism, of feminism, of every kind of art and science, that so conspicuously set their seal upon the holiday season. Nationality as a limiting force is breaking down before Cosmopolitanism. In directing its forces into an international channel, socialism will have no difficulty whatever, except with the ignorant devotion of Muscovy, the caste system of India, and the individual self-consciousness of Japan. Capital will have less.

We do not forget that on recent occasions the cosmo-

<sup>1</sup> *Growth of Laws and Usages of War*, 88.



politan views of Mr. Hervé and his school have been disclaimed with at least sufficient emphasis by other socialist orators and bodies. It is an emphasis which strikes one as overdone. It sounds like the cry of a leader who feels, in spite of himself, that his followers are travelling on a road which will bring them to an unlooked-for goal, and who thinks to avert that result by telling them very loudly that they are all right and on the proper track. English socialists, at any rate, are under little doubt as to the propriety or otherwise of maintaining the frontier-posts. Some of their most popular, if not their most trusted, protagonists, hailed the extinction of the South African Republic as a small step towards the ideal cosmopolitanism. The opposition to Mr. Hervé's cosmopolitanism is, in fact, a German product. It arises because socialism is in Germany not a doctrinal creed, but a rallying ground for all who are discontented with the régime of autocracy. The socialist party in Germany is a *bourgeois* party. A logical socialism cannot stop at limits of territory or race, any more than a living religion can stop there. National freedom is only a large-scale individualism. But a socialism which is little more than a comprehensive and intensified Opposition, has no need to take the world to its arms. And if, as in Germany, it has not yet exhausted the stimulus and impulse of a great demonstration of national solidarity and success, it is not very likely to do so. German patriotic socialism is, we conceive, a by-product, arising from a particular set of causes, and unlikely to prove of any permanent interest. As little likely would it be that the patriotic fireworks of the imperialistic financier should have any true significance. The patriotic socialist is not really a socialist: the patriotic market-rigger is not really patriotic.

We are therefore confronted with a coming condition of affairs, in which the force of nationality will be dis-

tinctly inferior to the force of class-cohesion ; and in which classes will be internationally organized so as to wield their force with effect. The prospect induces some curious reflections.

As in former times the individual imaged his country as a wider reflection of his home, so in these days the individual finds the wider reflection of his home in his class. It is of them that he has the intimate experience and knowledge that the man of a bygone day had of his commune and his neighbours. They are his *patria* : the people of his father's house, among whom he spent the impressionable days of his child-life. It is they by whom he will stand for the rest of his time. The fact that his class is not really as homogeneous as he thinks it is, is indifferent. He has moved amongst his class, and it does not matter that he has moved among only a small section of it. He has had playmates of his class ; has gone to school with people of his class ; has visited friends of his class ; has sat with others of his class at the theatre, or in church or chapel. He thoroughly knows his section of it ; and he thinks he knows the whole :—which, for our purpose, is as good as if he did know it.

All over the world, society is organizing itself by strata. The English merchant goes on business to Warsaw, Hamburg or Leghorn : he finds in the merchants of Italy, Germany and Russia the ideas, the standard of living, the sympathies and the aversions which are familiar to him at home. Printing and the locomotive have enormously reduced the importance of locality : it is the mental atmosphere of its fellows, and not of its neighbourhood, which the child of the younger generation is beginning to breathe. Whether he reads the *Revue des Deux Mondes* or *Tit-Bits*, the modern citizen is becoming at once cosmopolitan and class-centred. Let the process work for a few more years : we shall see the common interests of cosmopolitan classes re-

vealing themselves as far more potent factors than the shadowy common interests of the subjects of states. The Argentine merchant and the British capitalist alike regard the trade union as a possible enemy—whether British or Argentine matters to them less than nothing. The Hamburg docker and his brother of London do not put national interests before the primary claims of caste. International class feeling is a reality—and not even a nebulous reality: the nebula has developed centres of condensation. Only the other day Sir W. Runciman, who is certainly not a Conservative, presided over a meeting at which there were laid the foundations of an International Shipping Union, which is intended to unite ship-owners of whatever country in a common organization. When it is once recognized that the real interests of modern people are not national, but social, the results may be surprising.

There is no more exclusive and proud society than that of Austria. But that of Hungary is equally proud and equally exclusive. Supposing that the solidarity of class arrived at the stage at which the people of property and culture were driven to combine against the dictation of swarming barbarism, and were thus led to realize their common unity, the *crux* of the difficulties of the Austro-Hungarian Empire would disappear. And so with wider racial animosities—those of Slav and Teuton, Celt and Teuton, Aryan and Turanian.

The Finn, the Lett and the Pole might forget the secular oppression of Russia, the Servian that of the Turk. Indeed, we have seen how easily, even in the Balkans, ancient feuds are calmed by the presence of a novel danger and allayed by the experience of a new irritation. And, although the compulsive force might not comprehend the Orient in its orbit, it could not but profoundly affect it. The flamboyant national sentiment which is characteristic of Australia would appear in its true light as a class sentiment. The political fetishes

of America and England would dwindle to infinitesimal proportions before the facts of class-union.

We should then have arrived at much the same state of suppressed anarchy as existed in Europe before the advent of feudalism. The obligations of the individual would be measured in the main by his caste, as then they were by his tribe. Legislation would be paralysed ; the old organs would be repudiated by the contending forces, whilst they on their part would have no authority to create new ones, for their powers would be limited by the very conditions of their being. Existing to protect definite common interests, they would have no mandate for general legislation. Sporadic attempts at legislation would be made, but they would be exceptional. They would threaten the nascent unity of the caste : which would be visibly willing to unite for self-protection and aggrandisement, but not for sudden alterations in the habits of its various branches throughout the world.

Would any Byzantium, like an island amid the surge of novel surroundings, remain unaffected and retain the old traditions of sovereignty ? It is possible that Tōkiō—like Byzantium, the Eastern outpost of Western thought—might escape the confusion and clash, and that to future ages the coherent unity of Japan might hand on the conception of a Territorial Empire.

## CHAPTER VIII

### FEDERATION

IF there is one attitude of mind more than another which is out of favour at the present time, it is Particularism. The wave of racial feeling which made itself felt in the middle of the last century had great material triumphs. A united Germany has in war and in peace secured results in the material sphere which command the attention of all, and excite the envy of the crowd. A united Slav or Anglican Empire is the dream of her neighbours. And if a united Italy has been unable to point to any conspicuous successes in one direction or another, it is undeniable that she nevertheless exercises an influence in the councils of Europe which was not hers prior to 1870. The result has been *megalomania*. As in the sphere of private business we are told that the day of small things is over, and that the only hope of prosperity lies with the vast concerns whose capital is counted in hundreds of thousands, so in politics the cry is that the era of moderately sized states is passing, and that the immediate future will see the world divided between the four or five great empires which alone are fitted to survive: the Austro-German, the Anglo-Saxon, the Russian, the Latin, and the Mongol. The anti-imperialist is reduced to confronting this vision with the not very different one of a single World Empire.

Yet the commercial expert is not so certain as he was that the largest concerns are the most prosperous. There is a limit, after which it seems that the agglomeration of capital is of no further use. The managers of branches become independent. The central secretariat

becomes a drain upon the business. Personal interest in the welfare of the establishment becomes dissipated. The possible savings which are effected are much more than balanced by the wastage and slackness which the withdrawal of control to a distant eyrie renders inevitable. Control at seventh or eighth hand may be theoretically perfect. But in practice there is a leakage at each transmission of power, and it increases in geometrical progression. The compact business, in which the master's hand is felt at every turn, is not benefited by absorption into a larger whole. Is the same true of states ?

From the Slavonic wilderness there comes the voice of a prophet telling the world that the day of great empires is not coming, but passing. Tolstoy looks to the near dissolution of the unwieldy giants who are leaders in the family of nations—stupid with the stupidity of giants, ferocious with their ferocity—and the rise in their stead of a multiplicity of self-contained, self-knowing communities, whose members will be united together by organic and vital sympathies, and not by their common submission to a common policeman.

In point of fact, the only respectable patriotism is local patriotism. One must know a thing in order to love it, and it is not possible to love a thing by sample. Devotion to an idea—to a sort of amalgam of green lanes, solid comfort and straightforward fairplay—may be magnificent, but it is not patriotism, even though you label the amalgam "England." Patriotism is devotion to a concrete country—its land and its people. To be devoted to it, you must know every mile of the land and every clan of the folk. You must have worked the fibres of your heart into it. It is not possible to do this with more than a small area : hardly possible to do it at all, past seventeen. The patriotism of Japan is not patriotism in our sense : it is religion. It is devotion to an idea, to a divine personality, but it is by no means devotion to a people. The ecstatic preachers of patriotism are led into strange corners

by failing to realize the distinction. Contempt was poured by them, nine years ago, upon the idealist known as the "Little Englander," because he withstood the great mass of the English people in the name of the English Ideal. Now, they themselves are doing precisely that very thing. Because the great mass of the English people do not rush to the rifle butts and embrace the military career with both hands, stern patriots like Mr. Stanley Little solemnly throw them over, in the name of their own Ideal England. In truth, neither idealist is patriotic in the least ; for the simple cause that nobody can be. It is impossible to know a complex mixture like England well enough to be patriotic about it in any but a superficial and sentimental fashion. Neither the Little Englander, nor the militarist, nor anybody else is fond of the English population, as such. The thirty-two million actual living English are not their England.

For a genuine patriotism, we need a limited population whom we can know well. The Greek appreciated this when he doubted whether there could be a *πόλις* of more than a few thousand freemen. A community reckoned by millions must be a despotism. Not even the Radical pretends that in a democracy the people govern themselves. He only urges that they have security for good government. They can dismiss their governors. So the slave might have liberty to change his master. Behind the ostensible governors who can be changed, there remains, unchanged and unchangeable, the spirit of officialism. A million people cannot, in the nature of things, either know their governors, or know who are best fitted to replace them, or how to effect the change. They can change the men who turn the handle of the machine of government, but they cannot mend the machine. They hardly know that it exists. They are incapable of forming, much less of expressing, a united and coherent opinion on anything. That is not because they are unintelligent ; but because it is not possible that a million scattered people should

know one another's real views, and be thoroughly informed of the *arcana* of government. The press undoubtedly is no clue to their wishes. Leading articles are written for, and read by, keen and prejudiced party men. And most people are not keen party men. The paper is the jester, the amusing companion of modern life. It is not the monitor and guide. It influences opinion: but it does not by any means (even in the case of the financial press) reflect it, except as a concave mirror does. Representative institutions help us no more to ascertain the views of the democracy. The constituency must elect a supporter of this or that party; or, at least, of this or that heterogeneous programme. The work of creating a new party is herculean—and then, one has only a third bag of mixed sweets to offer. The candidate is elected on some measure which it pleases party men to regard as violently controversial, and if his party reaches power, they regard themselves as having a "mandate" to carry it into law, although, from the very fact of its being a "party" measure, it is *ex hypothesi* violently hated by approximately half the electorate. Non-party measures are generally even worse reflections of the democratic mind. They are such as approve themselves to permanent officials and Cabinet Ministers (who will not as a rule be affected by them), and the democracy is merely lectured to about them. Does any one for a moment suppose that the mass of working-class parents like the Education Bill of 1870? or the Licensing Bill of 1871? or that any one but an official bigot has anything but contempt for the pallid terrors which prompted the smoking clauses of the Children Bill of 1908? Even where the Referendum is adopted, it seems more than likely that the democracy would be engineered into accepting the party measure wholesale, as now they accept the party candidate. It is true that in Switzerland the Referendum works otherwise. But then, Switzerland is a country of local self-government.



Some thinkers, struck by the fact that the opinion of the British electorate at a general election is pronounced, if on anything, on some matter upon which it is certain to be practically equally divided, have warmly advocated Proportional Representation. As affording more perfect representation of the strength of parties, the step is admirable and even necessary: but it shows that the ideas of parties and party-leaders, groups and group-commanders, are all that can be represented by an articulate assembly in a country of the size of modern states. That is the insuperable difficulty.

It is a difficulty which lies deep in the nature of things. The human mind and the human faculties are limited. It is not possible for one person to speak for six thousand, or six hundred, except on one very plain and simple issue.

The result, whether this reasoning is fortunate in commending itself to the reader or not, is that the ordinary private person is a fly on the wheel of the car of state; and that he knows it very well, and would (if permitted) be happy to sell his vote at the ensuing election for sixpence, or for five pounds, according to his means. Ordinary life is emptied of colour and meaning, and reduced to the enjoyment of such private luxury as can be recommended: for we do not suppose that the magnanimous exhortations of bishops and deans to plunge into the maelström of municipal politics, and spend one's energies on gasometers, has very much effect. Lord Rosebery long ago lamented the decay in England of local interest. Cities which used to be centres of a vigorous social life, with a culture and an individuality of their own, are now left in a backwater of drab monotony, while all the elements of vitality are drawn into the "one great uninteresting pot of London," where they whirl in an unmeaning, uncomprehending dance of atoms.

The life of localities is decaying before our eyes. Thirty years ago, in a town of forty thousand people, the High School was a sufficient school of manners and learning.

The Head Master was probably a good classic, or a wrangler, and few, if any, of the chief inhabitants dreamed of sending their children anywhere else. Home life and school life were blended in one settled local atmosphere. Now, there are periodic juvenile incursions from Uppingham and Clifton and the rest of the institutions where youth is segregated under artificial conditions of hothouse culture for thirty weeks of the year : but the native town is only material for contempt ; and as for the native town's academy, it has become that monument of educational ineptitude called derisively a Higher Grade School. The new generation make one another's acquaintance not in the classroom and playground, but in the billiard-room and at the hotel bar. The Irish aristocracy, Mr. Birmingham tells us, unable to join in the local life, try to light a hearth-fire in the chilly halls of Empire—" which is the same as if a man should set himself down in some huge caravanserai and say that he had found a home." But really the Irish aristocrat is not singular. The English *bourgeois* is imitating him with much fidelity.

We have all heard of the gentleman who, interrogated as to the final purpose of his strenuous life in the Metropolis, confessed that his ultimate end was to amass sufficient money to enable him to " retire to Bootle." As things go, there will soon be no home-like Bootle to retire to.

It is enough to think of Venice, Sienna, Florence, of Athens, Syracuse and Thebes, to realize the poverty of local life in great aggregations of population under a centralized government. It is partly this that makes the socialist propaganda attractive. The poor are always sure of help in a small community where they are known. It is the driftwood of a huge, unorganized population that form the hopeless element. It is their terrifying absorption in this collectively hopeless crowd, undistinguishable to the eye of the rest of the world, that the poor resent. The cessation of vitality in the local centres means to the self-supporting classes the extinction of

emotion and splendour : to the poor it means that they have no more any friends on earth.

Contrast the leaden monotony of an English or French manufacturing town, its councillors doing the work of master-dustmen in the spirit of dustmen—its pettifogging officials riding rough-shod over the weak, in the panoply of incomprehensible by-laws—its unmeaning gaieties and its empty solemnities—its thousandfold struggle to obtain through private luxury the delight which comes naturally from mutual companionship—with the full, pulsating life of those bygone cities. It is the interest which comes from personal participation in the work of government that lifts individuals out of the narrowness and pettiness of provincialism, and renders them indifferent to riches and luxuriousness. A society is not provincial because it is small, nor because it is bizarre ; but because it is futile. It is provincial because it has lost its *raison d'être*. It has no reason for self-respect. It takes its orders from a metropolitan master. Its members are isolated in their common insignificance. With autonomy established, provincialism disappears. It is no longer possible to mask bureaucratic despotism under the forms of democracy. The dead machine of government crumbles, when neighbours and friends are concerned. Government becomes a rational and human thing. The consequences of evil legislation are brought home at once to every legislator.

“ Local self-government,” as we understand it now, is worse than useless. The local authorities have too much power to be harmless, too little to be cared for. But with real freedom, we should see a vital change come over localities. The ships of Liverpool might rival in state, as they surpass in size, the argosies of Sidon ; the indomitability of Cork might match that of Pisa, and the spirit of Athené throne herself not only on the heights of Attica but on the crags of Edinburgh.

It is indispensably necessary to have independence

in localities if we wish to restore that interest to provincial life which circuses and councils alike have failed to provide. The only real interest in life is self-development : and self-development requires freedom. It is a commonplace to say that town life is more interesting than country life : but then the cheap delights of town life are rapidly palling. For a time they amused us, but now we are asking on all hands the question of the newspapers—"What is wrong?" What is wrong is that there is no life in localities : no common sense of unity and mutual protection. And the mistake of socialism is to try to bring it about by force, as the once-celebrated Tommy Merton tried to gain the love of the pig by catching it by the leg.

Independence is the sovereign remedy for apathetic indifference. Where a community, not too large for mutual self-knowledge, is thrown upon its own resources, and freed from the pressure of external interference, its doings will at any rate be interesting, and whether they are just or unjust they will at least be human.

But the attendant danger is frequent war. The gift of Centralization is universal peace. True, it is the peace of death. Under the beneficent Empire created by Augustus, art died, literature died, nobility of manners died, and only two energizing forces lived—the Alexandrian philosophy which provided a way of escape into ethereal regions, where the politics of earth were indifferent, and the Christian religion which was inspiring Augustine with the vision of the City of God. Yet the Empire meant peace, then as under Napoléon III. And if the New Particularism offers life and splendour, it offers it at the risk of suffering and storm. The independent cities and castles of Greece, Italy and Germany were at constant hand-grips. What is the conciliation of Peace and Liberty?

The conciliation is Federation. Peace and Liberty are not estranged and irreconcilable. How could it be

otherwise than unnatural that sister-divinities could be antagonists? At the Congress of Peace in London of 1908, the eyes of those who entered the hall of meeting were struck by a cartoon in which was illustrated the text—"Righteousness and Peace have kissed each other." That Liberty which is the first condition of Rightness is no less reconcilable with Peace. As the angels of Rightness and Peace, in the imagination of the Palestinian prophet, intertwined their branches of lily and olive, so the laurel of victorious independence may fitly be woven in the wreath. Federation is the ribbon which unites them all. It ensures Peace, and it ensures Liberty. The federated nations keep their Independence in all but a narrow sphere. In that sphere they resign it—but with no feeling of resignation, for it is that section of independence which is not worth preserving. It is the liberty to oppress their neighbours.

"Sovereignty is partible." A state may resign its sovereignty entirely, and become absorbed wholly in another. In that case, it may be admitted to more or less of Home Rule: the North American States have a good deal; the German and Swiss have more: Bohemia and Scotland have very little.<sup>1</sup> Its constitutional

<sup>1</sup> In Bohemia the Crown can dissolve or prorogue the Diet at will. It appoints the President (*Landmarschall*) who arranges its business. It can veto its legislation. Its executive is in all important matters independent of local control (*Lowell, Governments and Parties in Continental Europe*, II. 91). The Diet can legislate on little beyond local government, agriculture, higher education, charities, and local public property and rates. By devolution from the Reichsrath, it can legislate on primary education and church affairs. It is curious to notice that Austria had the same difficulties with her provinces as London had with Welsh county councils, in regard to the carrying out, under the central legislature, of the scheme of primary education adopted by the latter. It seems correct to say that the powers of Bohemia (which, besides, are no more and no less than those of Carinthia or Carniola) are little more than those of the Ayrshire county council. And it seems to be intended that the South African federated states

power of retaining its Home Rule, if any, may be great or small—but so far as sovereignty is concerned, that is gone altogether. It is no longer regarded as one of themselves by the family of nations. Its fate is to them thenceforward a matter of no concern. Morally, they may deplore the ill-treatment of its population, or the withdrawal of its autonomy, particularly if that is unconstitutionally carried out. But its ill-fortune no longer excites them as an indirect blow to themselves. When an independent state is wronged, a quiver passes through the assemblage of independent states. Not even the strongest can quite afford to disregard the thought—"It may be our turn next." But a province, autonomous or not, is regarded as fair game for its international sovereign. States will not take the trouble to learn each other's constitutional law. They know one organ of a foreign country—its Foreign Office. Anything that the Foreign Office tells them of the organization of its own state they must believe, unless palpably absurd. They know nothing of State Rights. They may surmise, and even be pretty certain, that such rights have been infringed: it is not their affair if they have. The constitutional guarantees of individuals may be abolished, and the foreigner remains unmoved. The constitutional guarantees of provinces are of no greater concern.

And accordingly, it is a capital test of the existence of a state as endowed with some scintilla of independence, that it maintains diplomatic relations with at least some Foreign Courts. It is not a conclusive test. States may exist, the relations between which and their protectors or suzerains are so well known, clearly defined and scrupulously respected, that it would be as great a shock to general feeling for the suzerain to infringe them, as it would for that sovereign to attack an independent nation. And *e converso*, a province may main-  
shall imitate it in that respect. Their sphere of activity almost appears to be modelled on the Austrian.

tain agents abroad, just as a joint-stock company might ; negotiating, for convenience, with foreign governments, but pretending to no independent authority. Still, the fact of maintaining a regular foreign department and permanent legations is in general almost conclusive of a certain amount of independence.

But between complete independence, tempered only by contractual engagements, such as is enjoyed by France, Costa Rica or China, and complete dependence, such as is the position of Devonshire, Canada, Zanzibar or Baroda, there is the possibility of a *tertium quid*. In the case of Independence, foreign nations do not need to look at constitutional relations, for there are none : in the case of Absorption, they are absolved from noticing such as there are. But, in this third case, they must notice them. The state which has parted with some fraction of its sovereignty still retains its international existence : still remains a nation : still is an object of immediate concern and solicitude to all the nations of the world. So, in the German Confederation of 1807, there was a Federal organization with definite (if restricted) powers. If it had exceeded those powers *vis-à-vis* any tiny Duchy, national sovereignty and independence would have been threatened all over Europe. When the Federal States of North America stamped on Virginia and the South, there was some moral disquietude, but no one felt that the independence of states had received a shock. Virginia had, for better or worse, managed to merge herself in the United States in a fashion which Saxe-Meiningen had not imitated.<sup>1</sup>

<sup>1</sup> A good illustration of the difference between a grant of constitutional autonomy and a grant of more or less limited independence is furnished by the Austrian award on the subject of the Mosquito Indians.<sup>1</sup> Formerly subject to a British protectorate, they were, in 1860, abandoned to Nicaragua, with the reservation by Great Britain in their favour of autonomy and of

<sup>1</sup> See p. 273, *supra*.

So it is necessary to contemplate the cases in which a little study of constitutional law may be requisite :—those, namely, in which a state has parted with some elements of its sovereignty without ceasing to be an independent Government, treated and treated with as such by the other nations. If the cession is made to another country, then the relation is termed Dependence—it may take the form of Protection, Suzerainty, *Mi-souveraineté*. If not—if the sovereignty which is yielded up is in abeyance, or if it is placed in the hands of some common authority formed *ad hoc*—then the relation is termed Federation. And a foreign country may be puzzled to know whether to believe the foreign minister of the ceding state or the foreign minister of the Federation or of the other states associated in it, when the former complains that its reserved independence has been violated. Fortunately, there is a guide in such delicate questions. The Roman law always presumed in favour of liberty. The law of nations presumes in favour of independence. If a state cannot clearly be shown to have resigned its powers, it is presumed

certain political and pecuniary advantages. Nicaragua subsequently claimed absolute sovereignty over the Mosquitos, and the Government of the United States supported her in the contention that the reserved rights were constitutional rights merely, dependent for their fulfilment on the goodwill of Nicaragua, but conferring no rights of interposition on Great Britain. Austria repelled this contention,<sup>1</sup> though the United States Secretary of State subsequently brought forward the analogies of Louisiana and Florida.<sup>2</sup> In those cases, France and Spain had stipulated for particular treatment to be accorded to the inhabitants of the districts in question—yet they never thought of intervening in their favour in the domestic arrangements of the United States. The answer to that argument probably is that there was no occasion for them to do so. Lord Salisbury was in every way justified in maintaining that the treaty could not be rendered nugatory by the admission of such analogies.<sup>3</sup>

<sup>1</sup> 72 S.P. 1212.

<sup>2</sup> 81 S.P. 746, Bayard to Phelps, 23 Nov. 1888.

<sup>3</sup> *Ib.* 761.



to have retained them. This accords with what one would have expected. The foreign nation knew the independent state Atlantis. It still knows the state Atlantis, and it cannot hold that it has limited its independence in the face of its own protests to the contrary without clear proof. There is a natural inclination on the part of foreign states to avoid a conclusion which would involve them in the meshes of constitutional argument.

One very common source of dispute rests in the possibility that the state has not really ceded or resigned its powers at all, but has merely contracted not to exercise them. In that case, there is no real federation—nothing but a more or less close alliance, preserving to each party its complete independence, subject to the complaints which may be made against countries which fail to fulfil their engagements. In such cases, it is sometimes said that it is the intention rather than the form which is to be looked to, and that an apparent contract may be interpreted as a conveyance. The very purpose of such solemn engagements is, however, to make it formally plain what the intention is. If the parties choose to clothe their arrangement in the forms of a mere contract between states which are and remain independent, it can hardly be argued that their agreement was so far-reaching, or so important, that it must be held to have been meant as a cession of sovereignty on the part of one or both. The conception of the difference between a promise and a transfer is common to the Roman and the Anglican law, and through them to all civilized nations. The idea of interpreting a solemn diplomatic document, couched in well-known phraseology, by guesses proceeding on estimates of the extent and importance of the engagements undertaken, is one which would be dangerous to a degree, if it were ever seriously entertained. At most, such considerations must be purely secondary.

A real Federation differs from a Treaty of Alliance, however close, in this :—that the federated state not only enters into an engagement which it would be wrong to break, but it deprives itself of the power of breaking it. There is thenceforward no person or body who can be regarded as exercising the surrendered powers in the name of the state : no one who, in its name, can break the compact of union. A state can do wrong : it can break its solemn compacts, and be blamed or fought for breaking them. But a federated state does not break its compacts when it appears to act contrary to the terms of federation. None of its servants and ministers can commit it to that act of illegality. It is simply not its act at all : it is *ultra vires*. *Quoad hoc*, the state has lost its identity. The Federation can set matters right without its help. In setting matters right, the Federation does not make war on it ; it merely exercises its own prerogative. It is a distinction which is familiar enough to the lawyer, but which the layman is apt to deride as a subtlety. It is easy, however, to show its importance. The difference is precisely that between the horse which your neighbour has promised you in return for cash down, and the horse of your own which he has enticed into his own stable. You cannot help yourself to the promised horse : you have every right (short of disturbing the general peace) to help yourself to your own. So, in an alliance, the states which consider that an allied state has broken the terms of their compact, can remonstrate, retaliate, fight : but they cannot forcibly interfere with the recalcitrant in the calm fulfilment of the normal order of things. Whereas, in a federation, the federal authority, acting within its limits, can use forcible means without creating war, or a pretext for war.<sup>1</sup> Or again, the difference may be

<sup>1</sup> The last five words are added to meet the views of those who hold that one independent state can coerce another by active force without being at war with it. These authorities consider

illustrated by the distinction between a marriage and a promise to marry. It is not legal to break a promise to marry. But it is a very different thing from misbehaviour by a married person.

In many practical respects, a close alliance presents most of the features of a federation ; and what is said of the one is generally true of the other. But the essential difference is, that forcible action to uphold the terms of the federal compact within the territory of a federated state is not invasion—is not even just and laudable invasion—but is a simple exercise of ordinary peaceful right.<sup>1</sup>

Just so, if one nation, without abandoning its independence, has granted a real servitude to another, in the shape of a right of way, it is no warlike invasion to make use of that way by forcibly overcoming the subsequent opposition of the territorial state : whilst, on the contrary, if all that has been secured is the personal promise of free passage without interference, the beneficiary can complain of a stoppage, she can threaten war if the opposition is not removed, she can back her claim by war—but without war she cannot force her way through.<sup>2</sup>

To think this distinction trivial is to underrate the elemental forces that lie at the root of all law. It is not the calculated numbers of ships and bayonets on one side and the other that influence state action. It is the lines of least resistance in the brain that determine conduct. Some actions are out-of-the-way :—" People that in such a case a lawful occasion of war is always afforded to the state attacked.

<sup>1</sup> It is just theoretically possible that in a case where Federal force was forbidden, universal sentiment would nevertheless be so strongly against all violation of the Federal compact that the result would be a federation and not an alliance. But the statement in the text is practically sufficient.

<sup>2</sup> Cf. the writer's *International Law in South Africa*, c. III. and pp. 273, 275, *supra*.

don't *do* such things!" It is the improbability that a particular act will ever enter into the calculations of statesmen at all, which counts. Breach of treaties, though never lawful, is always possible to contemplate. Revolutionary violence—for that is what disregard of federal compact must be—is much more *outré*. The statesman who embarks upon it does so as an outlaw. His new conception is out of focus with the ground-plan of the world which he, in common with the rest of people, is bound to entertain on pain of utter confusion of idea. It may quite well be successful: but it is inconsistent with so much, that it does not easily find a foothold in the mind. And an idea which does not easily get a hearing in the mind is not likely to have its probable success calculated. People are too busy to attend to it.

And there is this further great practical consideration. In an armed conflict between independent states one of which has broken an engagement, the rest of the world must remain strictly (and ridiculously) neutral. In an armed attempt by a Federal power to enforce its clear rights, it is difficult to see that neutrality is necessary.

The broad distinction is between advantages for the fulfilment of which one looks primarily to a particular state or person, and advantages which one looks upon as simply one's own, without the intervention of any one else. It may quite well be that (as in the case of an ordinary contract of sale) one ultimately expects to get the goods (or damages) even against the will of the vendor. But it is through the operation of his will and within the limits of his resources that the promisee must expect satisfaction.<sup>1</sup>

<sup>1</sup> Formally and logically, the two classes of advantages are distinguished as conferred respectively by "rights availing against a particular person," and "rights availing against persons generally." The right availing against a particular person (or state) includes such rights as arise out of promises. The rights availing

It is therefore apparent that there are at least seven relations to be distinguished :

1. Absolute independence.
2. Independence tempered by treaties which depend for their execution on the state itself and deal with isolated topics.
3. Alliances, resting on contractual engagements, but such as are of a more intimate character.
4. Close alliances, resting on contractual engagements, but providing for institutions imitating the common cabinets, courts and camps of federal states.
5. Federation (or Dependence), resting on a cession of more or less independence.
6. Absorption, with a concession of autonomy.
7. Absolute absorption.

The Close Alliance has the disadvantage of resting entirely upon the continued willingness and ability of

against persons (or states) generally are the negative rights which secure that no one shall interfere with the things which we regard as our own. The terminology is unsatisfactory ; because it connects dissimilar things. It is not really the right to the fulfilment of the promise which is parallel to the vague army of "rights" to be undisturbed by unknown and unknowable multitudes in our enjoyment of our own. One does not, in thinking of one's possessions, mainly, or much, think of the myriads whom one is entitled to exclude from them. But when one thinks of a promise, the individuality of the promisee *saute aux yeux*. The formal awkwardness of coupling rights (such as those conferred by a promise) with concrete things (such as horses and ships), induces thinkers to prefer to invest with prominence these negative rights of exclusion, and to couple them with the rights which avail against definite persons. Of course, a person never thinks of—"my loans and my powers of excluding people from my property," but of "my loans and my property"—when the borrower does not pay. It may be strongly doubted whether "I had a right that my horse should not be kicked" is not a forced expression which no one but a student of jurisprudence would employ.

its components to fulfil their engagements to respect the decisions of the common organs. If one of them is to be forcibly brought to reason, it must be by war or its equivalent. Foreign countries must be neutral in the contest. Its own subjects will have no scruples as to the legality of fighting for it. In a Federation there are doubts and difficulties which render it hard for the government of a component state to assert a sovereignty which it has not got. They render its opposition to the Federal forces (acting within their powers) rebellion and not lawful war.

Federation, it is unnecessary to add, must be distinguished from the so-called "Federal States" of which North America, Mexico<sup>1</sup> and Brazil are types. The designation of the provinces of the North American Union by the word "state," which has come to be the accepted type-word for a social organism of a very different kind—the self-contained, independent unity which is the normal subject of modern international law—has caused a great deal of confused thought. It is still not without an undue amount of influence on current speculation. "The States," as a common expression, means the United States of North America—which are not states at all: which, at the uttermost stretch, have only a shadow of the reality of the independent states of Europe. By a transference of the name, one is deceived into thinking that the heterogeneous, self-poised, states of international law could readily be converted into Americanized "States" of a World-Union. Local sentiment was strong at the time of the formation of the Unions of North America, of Mexico, of the Argentine and of Brazil. It may also be suspected that the first was the object of conscious imitation by the rest. But it is certain that it met the requirements of their case. There are plenty of incidents in the stormy history of South America and Central America to prove how party feeling centred in localities, and how

<sup>1</sup> See for Mexican Constitution (31 Jan. 1824) 13 S.P. 695, 701.

loose was the tie which kept distant places together. Bahia, Pará and Rio—Buenos Ayres and Salta—Vera Cruz and Mexico City—all the jealousies of cities like these go to show that a loose constitutional organization was internally an advantage if not a necessity. But everybody knows that the State of Matto Grosso, the State of Oklahoma, the State of Corrientes are names and nothing more, outside the limits of their own federations. And if the State of Paysandu and the State of Colorado have had a wider fame through potted tongue and a potato beetle, it is not as self-governing communities that they are conspicuous. It is Brazil, Mexico, Argentina, the United States, which the law of nations takes into account.

Sometimes, again, one speaks of a "Federation" of the British possessions. Some scheme for the representation of the Colonies in Parliament, coupled, perhaps, with the concession of a certain autonomy which that Parliament could not lawfully infringe, appears to be the central idea of such a conception. But whether the Imperial Parliament were supreme (as it is at present) or not would remain a wholly domestic concern. The limits of its powers, if any, would remain a wholly domestic concern. Foreign nations would know, as they had known, the Foreign Office, and a Great Britain for which it spoke. If it was constitutionally unable to coerce Australia, the whole Empire would have to stand the risk. If a nation chooses to spread its powers, it must take the consequences.

A word ought to be said of the "Feudatory" Princes of India. It was certainly intended that they should retain a measure of independence. It might even be argued that their treaties only imposed on them a contractual obligation. But from the time that that audacious Scotsman, Dalhousie, asserted that the sole right of interpreting the meaning of those treaties rested with the British Government, it became impossible any longer to consider them to be anything but step-children of the Empire—

without the rights of children, but with all a child's complete subjection. There powerfully co-operated to bring about this result the exclusion from diplomatic intercourse with foreign states, which was enjoined on the Princes. Indeed, it may be taken as a principle that the first and main essential which a state ought to look to, if it wishes to preserve an international existence, is to retain the power of diplomatic intercourse. States cannot be expected to take an interest in nations of whose existence they are officially ignorant.

Exactly the same remark as has been made regarding the princes of India must be repeated with regard to the rulers of Zanzibar and the Malay States. Their position is the same, though they are not controlled by the India Office, but by the Foreign or Colonial Office. Their rulers are mere cloaks for the exercise of power by the British. The reason for the retention of such *soi-disant* "Sultans" was avowed with more simplicity than cynicism by the general officer who was Governor of Singapore after the Pérâk War. "It would be inconvenient," he remarked, "to invest the population with the rights of British subjects." It was more convenient to govern through the forms of oriental despotism. This consideration, and by no means any sentiment of chivalry, it was that turned the scale against candid annexation. It will very much surprise any jurist if a transparent device of this nature can outweigh the obvious facts of the case, even where English law alone is concerned. A population which is *de facto* under the absolute control of the British Crown, however it comes to be so, must be treated as a part of the British dominions, simply because that is the fact. Certainly, in *Mighell v. Johore*, the Supreme Court held the Sultan of Johore to be a foreigner, on the certificate of the Foreign Office. But Johore was long on a much more independent footing than the rest of the Malay Peninsula: and to this day it might be argued to have a certain amount of independence, which



the polished diplomacy of its rulers long ago secured for it whilst the more northern territories still jealously avoided intercourse with Singapore. To this day, there appears to be no British Resident in Johore. English law aside, it is plain that no subterfuges such as the maintenance of a puppet throne will avail in the eyes of International Law to divorce power from responsibility. Napoleon's vassal kingdom of Westphalia and the Confederation of the Rhine were always treated as what they were—masks through which spoke the voice of the successor of Charlemagne.

Chili declined to consider Bolivia as independent, when confederated with Peru under the dictatorship of Santa Cruz.<sup>1</sup> "Bolivia and the new Peruvian States, under the title of Federal, are Provinces of a Military Autocracy. But even should the Peru-Bolivian Federation have any reality—should it ever be anything but a name with which it is attempted to conceal the usurpation of Peru and the degradation of Bolivia—should it not be patently condemned to destruction when the moment shall arrive to give to this fusion of States the unity of substance and form to which conquerors always aspire, [it] would not cease on that account to place in manifest danger the security of the neighbouring republics. Even if, on that supposition, Bolivia and Peru should preserve in certain respects their sovereignty under the aspect that is most important to foreign nations, they would form one sole political body. . . ."

One is much tempted to say the same of Cuba. The transitional character of the present régime renders it impossible to pronounce a definite verdict. But the French "Protectorates" of Indo-China and the German and British "Protectorates" of East Africa, Uganda, Nigeria and the like, are nothing but colonies.

Sir Fredk. Pollock has remarked that the modern law of nations breaks down, or is least satisfactory in application,

<sup>1</sup> 25 S.P. 816, Portales to Olaneta, 15 Dec. 1836.

in those cases where absolute territorial independence does not exist. The complexity of feudalism was replaced by the simplicity of territorial states. But there are needs for which this simplicity is an inadequate expression. The work of evolution must be to discover the necessary formula of synthesis. It must elaborate the idea of Federation.

It is, however, improbable that the relations of civilized with semi-civilized countries, now imperfectly and ambiguously expressed in the institution of "Protectorates," constitute the field in which Federation is most urgently called for. Civilized states are very willing to assume entire control of less advanced communities. It is true that they would at the same time like to decline full responsibility for them: but under no system, federal or other, could they combine diminished responsibility with entire control. In a federal union, they must resign some definite powers over their shadow-sultans and subject brown races: and this there is no sign of their willingness to do. It is very probable that with the advent of Federalism, they may have to take such a course. But the real pressure in favour of the Federal idea is the impoverishment of local life in the centres of civilization.

A very singular phenomenon was witnessed two years ago. We are accustomed to think of France as a land of intense national consciousness, where the racial enthusiasm of the Celt, the professional enthusiasm of the *savant*, the cosmopolitan enthusiasm of the artist, are swallowed up in a great national patriotism. And there, in that very France, the country of centralized unity and provincial insignificance, appeared the portentous legend of "*Regional Solidarity*."

The movement flickered out as suddenly as it began. The wine-growers who had threatened armed insurrection came quietly to terms with Paris. But the earth from which such an inflammable mist exhaled is evidently very far from solid. France has not forgotten the Com-

mune. Local solidarity, if the signs are not fallacious, is going to count for a great deal in the future. It seems to us the only alternative to the warfare of classes. Let us quote Cobden's eloquent words :—<sup>1</sup>

" I have looked even further : I have speculated, and probably dreamt, in the dim future—a thousand years hence—I have speculated on what the effect of the triumph of this principle [free trade] may be. I believe that the effect will be to change the face of the world, so as to introduce a system of government entirely distinct from that which now prevails. I believe that the desire and the motive for large and mighty empires, for gigantic armies and great navies—for those materials which are used for the destruction of life and the desolation of the rewards of labour—will die away ; I believe that such things will cease to be necessary, or to be used, when man becomes one family and freely exchanges the fruits of his labour with his brother man. I believe, that if we could be allowed to reappear on this sublunary scene, *we should see, at a far distant period, the governing system of this world revert to something like the municipal system. . . .*"

Such a state of things would restore coherence and interest to life. But it implies Federation.

Many hard things have been said of Federalism. It has, for instance, been said by a close student and an interested observer, to mean weak government, judicial government and conservative government. Perhaps it is difficult to say how far these objections are meant to connote disapproval. The first certainly appears condemnatory : the third may perhaps import neither praise nor blame ; whilst as to the second, it may even be supposed laudatory—but with this practical set back, that only a very law-abiding nation can be fit for Federalism. We shall try to prove that Federalism is neither weak, legality-ridden, nor essentially unprogressive.

<sup>1</sup> Cited in *The Arbiter in Council*, Macmillan, 1906.

Is it weak? First of all, is weakness imputed to it as a defect? A weak government, like a weak solution of iodine, may be an excellent thing. If it is meant that Federalism clips the growing feathers from Cæsar's wing, no one need find fault with it on this score. Assume, however, that it is a blameworthy weakness that is meant: how is it supposed to arise? It is natural to fall back on the ancient symbol of a bundle of sticks: the Federation's power is necessarily divided among local and central authorities; it must necessarily be dissipated and partly lost—*divide et impera*. Unity is strength.

But the real meaning of the parable is more accurately expressed by saying, "Harmony is strength." The crude piling up of material does not create the greatest strength. A bundle of sticks is stronger if all the sticks do not lie in the same direction, but if some arch outwards all round. The steel in a pair of scissors, though moving in opposite directions, is far more effective than if it were all massed into the single blade of a knife. States are strong when the force latent in them is distributed in such a way as to obtain the maximum effect: not when it is concentrated in one hand. This is admitted by the critics of Federalism. They admit that a federal government may be, in certain unfortunate circumstances, the strongest possible. But nevertheless it is weak. It is a pity that the circumstances are so unfortunate as to prevent the formation of a strong central government.

It may indeed be theoretically possible that a population might be so homogeneous and so little desirous of originality, that its ideal government would be a single central one. In that case, its practicable single government might be stronger than the most perfectly adjusted federal power in a more varied community. Such a population, however, and such a simple government, are the mere abstractions of mathematics. Were such a Laputa possible, its mechanical uniformity would neutralize the strength of its unity. The vivifying influence

of variety, by which each section progressively imitates the excellences of the rest, would be absent. Laputa must stagnate in its "strength," or immediately develop differentiation and acute weakness.

Admiration of such a mathematical perfection is somewhat akin to the spirit which condemns in the great name of efficiency the Swiss method of selecting cabinet ministers from separate cantons. Mathematically, if you choose seven ministers from seven cantons, you will not get the seven best men in the country. Local jealousies may make it necessary to adopt such a stupid rule. And the philosopher sighs at the necessity. He does not take account of the emotional factor, and he ignores the immense stimulus which is exerted on a minister who takes his seat at the council-board, not on his own merits alone, but as the representative of a great district. In the same way, Federalism is regarded by the enthusiast as a *pis-aller*. On the contrary, under all conceivable human circumstances it contributes an accession of strength to political organization.

It may, perhaps, then be doubted whether it is right to stigmatize a system as weak, which is not only the strongest possible, but so strong that it is not easily possible to conceive a stronger.

It is a mistake to lay too much stress on the friction between the elements of a federal organism. Friction there is, and also dissipation of energy. But the latter is far the more important source of waste. To insist on the element of friction—to regard the local and central powers as "pitted against one another"—is surely to take too gloomy a view of human nature. Because two forces exist, there is not the smallest reason for concluding that they must necessarily behave like fighting cocks.

Germany in 1860 was weak. But not because she was federated. She was weak because her local courts and cabinets were effete and jealous. And if Germany was weak, government in Germany was far from being

so. The United States were not weak in 1860. And government in the United States showed itself strong enough in 1862.<sup>1</sup>

And if weakness is no inherent vice of Federalism, so neither is excessive legalism. Without the law-abiding spirit, no political organism, federal, feudal or unitary, can stand for a day. Federalism, no more and no less than others, requires the presence of such a spirit. But it is charged against it, that it implies something more than this elastic response to restraint. It is said that it implies legalism in the narrow sense of subjection to lawyers and courts trained in the narrow and rigid ideas, and administering the methods, of municipal law. Sometimes this legalism is approved, and then the objection against Federalism is that few countries are fit for it. Sometimes it is condemned, and then the objection must be one inherent in the nature of Federalism.

At the present day, when, by what has been called a happy accident, an altogether unusual standard of probity and ability has become the traditional characteristic of the judicial bench in Great Britain and the United States, it is not surprising that the law-courts have become endowed in the minds of Anglican writers with a quite unique political position. Political power tends to centre in those who are most worthy of it. During the levities of the Restoration and the corruption of the Georges, the "legal monks" stood out in their dry infallibility, in some sort superior to the opportunist statesman, to the conforming ecclesiastic, and to the detested musketeer. The badly paid court servant of Stuart times surely and rapidly grows into the princely judge of recent days: a co-ordinate power in the state with the minister and the parliament-man—a greater than the earl and the bishop. The Lord Justice Farwell, in a recent judgment, talks of the courts curbing, in days gone by, the power of kings

<sup>1</sup> It must nevertheless be borne in mind that the latter example is one of a state which is not internationally federal.

and barons. It is a pious imagination. William I. and Henry VII. were not troubled by judicial checks ; nor did the courts settle the disputes of the Roses, or quiet the pretensions of Charles I. The judges were lions "under the throne." It is since the throne has become an occasional chair, that the lions have answered to the Lord Justice's conception. The check on the powers of force and steel was not the judge but the Cardinal Legate. The Victorian judge was a real check on the Victorian government. The modern conception of the courts as an integral factor in the political machine is an isolated and curious idea, not wholly naturalized in Continental countries, even in those in which the dogma of the "*séparation des pouvoirs*" is most ardently embraced. It is obviously a decaying idea. No modern government will allow its will to be permanently thwarted by the courts. The Taff Vale judgment is followed by a Trades Disputes Act. The U.S. Government ostentatiously defies the courts when expedient. Lincoln, in effect, asserted that he knew the law better than the Supreme Court : he did not affect (as Camden in the old days did) to commit a righteous breach of law : his position was rather that in the crisis in which he found himself the President possessed sweeping constitutional powers, which the Supreme Court might or might not concede to him. He deliberately chose to prefer his own reading of the constitution. And in earlier years—"John Marshall," observed Buchanan, "has delivered his judgment : now let him execute it, if he can."

But, if decaying, the idea is still strong in England and the States. Mr. Alton Parker, a late candidate for the Presidency, has urged with force a contention put forward in this country by the present writer, that the impartiality and great authority of the judges might well be used to compose the strife of parties in questions which, like those of Labour and Education, sharply divide the community. Such a tribute by so eminent a statesman to the unique position of the Bench indicates that there

is yet vitality in the conception of its position as a co-ordinate power in the state. It is natural that the framers of constitutions, at any rate on the shores of the North Atlantic, should regard it as proper, and even as necessary, that the interpretation of their words should be left in the last resort to a Court of Law, and not laid in the laps of politicians.

The main value of Bagehot's work (though it may not have been intended by him) was to explode the doctrine of the *séparation des pouvoirs* :—to show that, in the last resort, the sovereign authority was, in England, one and indivisible, and that neither ministers nor judges could thwart, even in particular matters, the legislative sovereign. The real centre of gravity may not have been exactly where he thought it was ; and it has certainly shifted since he wrote. But we no longer think seriously of "checks and balances." The great service of this change has been to discourage us from further attempts at "evolving an honesty from the joint action of a community of rogues." We are, at the moment, more inclined to put a full, and even an undue, measure of confidence in the man at the wheel—(only we do not refrain from talking to him). We hardly think of the courts as any protection against the Prime Minister : for we know that he enjoys a temporary omnipotence.

It is vain, therefore, to say that Federalism, or any constitution under which governmental powers are truncated, implies legalism, or a necessary exaltation of the courts of law. It was an accident that enabled several important constitutions to obtain a maximum of security by being placed under the ægis of municipal tribunals. A river in the fens may need to be canalized. But all rivers are not therefore canals. A unique Bench attracted unique powers. It is not their sole conceivable depository.

We may be referred to the Holy Roman Empire and the powers of the Aulic Council and Imperial Chamber.



These stand outside the Anglican system. They are venerable, conspicuous : and it may not be an objection that they never were formidable realities. But Council and Chamber arose only when the Empire was in decay : nor can any one affirm that in the history of Germany the Aulic Council is a dominant autonomous factor. It was useful in minor matters, but it never dictated to the Emperor. The Empire fell by legalism, indeed, but it did not live by it.

The supremacy of the law, in short, must not be equated to the supremacy of the courts. At times when the judges are the best exponents of the general sense of justice,<sup>1</sup> the equation may properly be made, but not otherwise. It is not an " identity " which is true at all times and places. The supremacy of the federal compact needs to be guarded. It must be guarded by law : but the best guardians and exponents of that law in these high matters may well be, not the courts, but the rulers. It is, in fact, their recognition of, and their subjection to, law, every working day, that prevents rulers from executive interference with the courts' decrees. Why should we assume that they are lawless by nature ? Why should we postulate a physically powerless Bench, invested with the duty of keeping them in their several spheres, and working on the lines of municipal law, as the *sine qua non* of a Federation ?

The charge of cramping conservatism is closely connected with that of legalism. Where the Federal constitution is embodied in a rigid document, to be unalterable for all time, and to be construed by, and enforced through, the courts, it is no doubt true that the attractive influence of such provisions may lead to a similar immortality being conferred<sup>2</sup> on ordinary legal and adminis-

<sup>1</sup> And, perhaps, at times (if such are conceivable) when the decrees of courts of law are the only orders in a locality which are naturally and usually obeyed.

<sup>2</sup> See *Report of the Commission on Municipal Activities* (U.S.A.).

trative enactments, such as it is normally the province of the municipal courts to enforce—(though, even in this case, the inference rests mainly on American eccentricities). If the Federal compact is regarded, on the other hand, as a matter beyond the ordinary municipal jurisdiction to determine conclusively, there is no more reason that its existence should exercise a conservative influence on the ordinary law, than there is that the existence of treaties should have that effect.

Those who bring such charges against federalism are really arraigning paper constitutions and artificial political arrangements which have no root in the general thought of the people. A manufactured federal constitution which tries to supply the place of any definite views in the minds of the population by laboured clauses and calculated checks, naturally does lead to friction and conflict. The local bodies and the central (if any) are subject to arbitrary and unreal limitations. Nothing is more natural than that they should chafe against the rigid bands which are imposed upon them. All law is restraining: but arbitrary law is galling. Hitherto, few federations, unless we except that of China and perhaps that of Switzerland, have corresponded with a popular sentiment. Popular sentiment cannot unite upon intricate details; few federations have been without elaborate peculiarities.

And it must be admitted that Federalism necessarily suggests, at the present moment, artificialism and constitution-mongering. Constitutions are born, not made. The real constitution of a Continental state of the ordinary type is not the laborious document which is known by that name—which can be suspended, revolutionized and revised. It consists of the fundamental assumptions, rooted in the hearts of the people, which underlie it, and which do not change. Inevitably, the mention of Federation suggests one more of these superficial arrangements of the permanent-transitory order, sus-

pended in a medium which may at any instant dissolve them.

All the same, federation does not involve artificialism, though it suggests it. It is supremely difficult to create a federal sentiment, but it is not difficult to recognize such embryo federal sentiment as exists, and to erect a framework which shall give expression to it.

Difficulty attends the formation of a federal polity. The popular imagination—even the instructed popular imagination—cannot condescend on particulars. Some complication is of the essence of federalism: it is not easy to diffuse a general sense of what the complications are. By the example of International Law, which is a fairly complex system, but by this time well understood by the educated classes, it is seen to be not impossible. But the reader will permit the repetition of the observation that a premature federation, made to order, neither promises nor deserves to succeed. Attempts at federation have usually erred by enforcing a stricter and more elaborately dovetailed union than the federated states were prepared for. There is a better prospect of success in beginning with something very simple.

What more simple principle could there be than the acceptance by groups of nations of the basic principle that war and violation of each other's territory should thenceforth between them be impossible? <sup>1</sup> Treaties may make war improper: yet it remains true that a nation which breaks such a treaty becomes a lawful combatant. "*Bellum*" *fieri non debuit: factum tamen valeat*. By federating on a pacific basis, states instantly deprive war of legal sanction. It must frankly declare itself as revolution, and seek its justification, if any, on moral grounds.

The difficulties in the way of anything much closer in

<sup>1</sup> It is not without interest to observe that, as Dr. Evans-Darby reminds us, "There were 100 cases of arbitration in Italy alone during the 13th century."

the way of union are great. It is not clear that nations are desirous of very much more. If the system of small self-contained units of government is realized, then an extended federal scheme will be a necessity. It is no argument against the possibility of such a system, that federalism as between the magnified states of modern Europe has so far proved a failure. That federalism has failed where it was not wanted is no reason why it should fail where it is. Federation has frequently seemed very desirable ; has been tried, and has failed. But the mistake has been made of applying a right principle in a wrong measure and in a wrong way. In cases where all that was needed was a simple league for mutual protection, a tissue of thorny texture has been woven in an atmosphere of suspicion, and the coat of mail has become a Nessus' shirt.

Take the historic failures of federalism. Put aside the instance of Ireland from 1782 to 1801. It was in no sense an independent Ireland that was federated with Britain in those twenty years : 1798 alone would prove it. Let us glance at Scandinavia and Austria. The initial difficulty meets us that it is impossible to look at them from the point of view of the native. Allowing for this obscurity, it may probably be said with accuracy, that (whatever the precise terms of the constitution) Sweden and Norway from their first union in 1814, formed a single European state, which tended to become two independent states from the beginning, but which only became two states in the eyes of foreigners in 1905. That is to say, there was no federation in the true sense at all—except perhaps for a few months in the spring of the last-named year. There was one state, whose two great branches stood to one another in constitutional relations which did not trouble the outside world, and which might be described as federal if one pleased, just as the relations of trade unions may be so described. For this state of affairs there were two good reasons. (1) Norway had

never been independent for hundreds of years. Since the Union of Kalmar, effected by Margaret in 1397, Norway had been (with one short interval) simply a subject province of Denmark—unrepresented, governed despotically by the absolute Danish King. The Convention of Eidsvold, by which the Norse army accepted the new situation of 1814, secured to Norway constitutional independence from their new rulers. But, internationally, it had no corresponding effect. The Danish province of Norway was handed over by Europe to Sweden, in compensation for the loss of Finland, which Alexander I. refused to part with. It would have been to stultify the whole arrangement, if Norway had simultaneously been recognized by Europe as an independent kingdom in mere federation with the Swedes. (2) Norway had no separate foreign relations with other powers. The ministers and consuls (of whom Norway had more than a fair share) were the ministers and consuls of the united kingdoms. It was the demand of the Norwegian Cabinet for separate consuls that precipitated the eventual crisis of 1904-5. If the Norway consuls had not—as they inevitably must have)—meddled with diplomacy, they would nevertheless have fixed foreign powers with a knowledge of Norway as a separate power with whom they might have to deal.

For such reasons as these, Europe knew only a single state—"Sweden and Norway." There was no federation of true states. The inner "constitutional" federation broke down because it was imposed by force and provided endless points of irritating conflict. It lasted a hundred years because the parties were sensible Scandinavians, and had no such burning question as that of slavery to fan their passions into flame. Ultimately, it seems that disunion always has an ethical spring. The true ground of the Norwegian revolt was, of course, not an absorbing wish for consuls. It was not any actual oppression by the Swedes. It was not pure ambition and pushfulness. The writer was in both countries at the acutest moment

of the crisis, and formed the deliberate impression that the root of the conflict was the feeling that the Stockholm people treated the Norse as "provincials." Misgovernment they could not complain of: they had perfect liberty. But the supposed metropolitan superbness of the Swede was intolerable to them. Whether their sensitiveness was or was not excuse for affronting the venerable King, and risking a general war, is another matter. The point is, that it was national jealousy, and not any material oppression, that provoked the explosion; exactly as, in America, it was no consuming desire to abolish or to continue slavery, but the rooted jealousy between Yankee and Southerner, that produced the conflict of 1861-4.

If the Northern peoples are to federate, it must be with more understanding than was exhibited either at Kalmar or Eidsvold.

Turn to the South-East of Europe. Hungarians will quarrel with me for speaking of "Austria-Hungary." No such monarchy exists for them; much less an Austrian Empire, a province of which is the land of the Hungarian Crown. Learned arguments—and the Hungarian is nothing if not a learned constitutionalist—can be based on the language of the *Ausgleich*, on the Pragmatic Sanction, on the Golden Seal.<sup>1</sup> But they are *nil ad rem*. For four centuries Austria has spoken in the name of the Hapsburg dominions as a whole, in the councils of Europe. There is a prescription in these matters. When we have been allowed to treat since 1526 with a well-known power at Vienna, claiming dominion within definite frontiers, we cannot be expected to recognize as a nation a novel power with whom we do not even come into official relations, and whose claims Austria energetically denies. Sympathy with the great qualities of the Magyar—his Oriental hospitality, his Occidental energy,

<sup>1</sup> The writer ventures to call it so, to distinguish it from the German "Golden Bull" of 1356. It was propounded by Andrew II. in 1222.

his fiery courage and independence—must not delude us into erecting the antiquities of history into facts of the present. The single Austro-Hungarian monarchy was a usurpation ; but it is none the less a fact. It is quite possible that if the Cabinets of Pesth repeat loudly and long enough the dogma of Hungarian separateness, they may eventually bring the world to believe it with them. As yet, it is impossible to say that that stage has been reached. Like the Swedo-Norwegian kingdom, Austria-Hungary is one nation to the rest of the world, though constitutionally it consists of two separate branches proceeding *viribus unitis*. Otherwise, we may as well recall Dunmail, and demand recognition for the kingdom of Cumberland.<sup>1</sup>

For a short time, indeed, in the history of the joint ménage, Hungary appears as a true international state federated with Austria. It was not until after 1760 that the policy of incorporation was consummated. For some time previous, Hungary had lost its international status : but probably it did not lose it all at once. Its position was for a time comparable to that of Scotland after the union of the crowns. The difficulty is to say

<sup>1</sup> See Lord Eddisbury's note, 37 S.P. 735, in reply to a letter to Palmerston in which the latter's Hungarian correspondent observed—" Je ne cacherai pas que la raison que son Exc. en donne : ' The British Government has no knowledge of Hungary, except as one of the component parts of the Austrian Empire ' m'a affligée profondément." In response to the constitutional argument, the statement is simply repeated, that " the British Government has no diplomatic relations with Hungary except as a component part of the Austrian Empire, *and can* receive communications respecting Hungary only through the diplomatic organ of the Emperor of Austria at this court." And even the United States' diplomatists told Kossuth that the difficulties of 1848 were—" a domestic quarrel between the Government of the Austrian Empire and one of its dependencies, with which no foreign power could properly have any concern." <sup>1</sup> For a clear exposition of the Hungarian view, see 38 S.P. 1126.

<sup>1</sup> 38 S.P. 254, 258.

precisely what that was. In fact, it was not very definite at the time. It was still possible to fix foreign nations with the knowledge that there was still a kingdom of Hungary, or of Scotland, even though the ruler was now known as Archduke of Austria or King of England as well, and was corresponded with through one channel in London or Vienna. But that state of things could not last long. It could not well outlast the memories of those who knew the courts of Edinburgh and Pozsony. If we put it at thirty years, we shall most likely overstate the case. And indeed, Hungary had not, like Austria, developed a diplomatic caste who might have continued their traditions after the union of the crowns. The Hapsburgs, on the other hand, "had by long and patient study learned the priceless value of a sound and sustained foreign policy."<sup>1</sup>

The pathetic persistence with which nowadays it is reiterated in Hungary, that Transylvania is "nothing but a geographical expression," must not make us lose sight of the fact that Transylvania was a very real entity during the period of Turkish domination. The Turks overflowed the plains of the Danube up to Pozsony: the princes of Transylvania maintained a virtual independence after 1526 in the fastnesses of the Eastern Carpathians. The Turks had driven a wedge of Mohammedan rule into the Hungarian territories which made it increasingly difficult to recognize a Hungary at all. A fragment of territory, clinging desperately to Austria and governed by the Austrian Archduke—a vast plain given over to the triumphant Turk—the independent Transylvanian princes:—these are what Europe saw in 1527 where Hungary had been.

The actual federations which may be said to have obtained on the Danube from 1526 to 1556, and in Britain from 1603 to 1633, thus failed for very different reasons. In the East the Turkish invasions well-nigh

<sup>1</sup> E. Reich, apud *Cambridge Modern History*, I. 324.



reduced Hungary from the rank of a state at all ; whilst in the West, the sympathy between Scots and English required a closer bond of union, and the two peoples drifted into political fusion.<sup>1</sup>

Neither in Switzerland is there a true federation. Switzerland, not Berne, nor Appenzell, nor Ticino, is the unit of international politics. So far as the " internal " federalism goes, it works admirably. It is often forgotten, when we catalogue Switzerland as a democratic state, how the little country proved a perfect miniature of Europe in the stormy years of 1846-8. It was in Switzerland that the struggle between the principles of Metternich and of Mazzini emitted its first startling sparks of discharge. The Catholic cantons and the Protestant cantons fought each other with the militant zeal of a past age. It would be interesting, were this the place for it, to trace the details of that conflict, and to show how neither party were regarded as rebels by the others, unlike the warring parties in America a decade and a half later. Of earlier forms of the Swiss Confederation space and knowledge forbid the treatment here. The cantons were clearly international persons as lately as Napoleon. Their federal union secured peace at home and respect abroad from Morgarten to Valmy. If it gave place to the unitary Swiss

<sup>1</sup> A curious question might arise as to the precise constitutional position of Scotland. It may quite well be that a court of law would declare an Act of Parliament valid although infringing the Treaty of Union. But it is by no means clear that if the Cabinet held that in so deciding the court had exceeded its functions (just as if it had pronounced a decree to be executed abroad), and that consequently they would lend it no executive sanction, their behaviour could properly be called " illegal." It may be asked whether this would not equally apply if the Cabinet should attempt to deny the court's powers of controlling arbitrary acts of the Crown : the answer is in the negative, for in that case they would not be upholding a great and universally accepted principle—the sacredness of solemn national undertakings.

Republic, at a time when thrones were rising and falling on the Napoleonic torrent, that is of little significance.

The Swiss Catholic cantons of Lucerne, Uri, Schweiz, Unterwalden, Zug, Freiburg and Appenzell contracted alliances with Spain in 1583, and renewed them at various periods.<sup>1</sup> In 1602, they, with Glarus, Bâle, Solothurn, Schaffhausen, St. Gall, Grisons, Valais, Rotwil, Mülhausen and Bienne renewed their alliance of 1521 with France.<sup>2</sup> Freiburg and Solothurn when admitted in 1481, were, however, disabled from entering into foreign alliances.

In 1777<sup>3</sup> a treaty was entered into by France with the several cantons, and was signed by King Louis' Ambassador and by the deputies of the Swiss towns and cantons to the number of forty-six. Their ratifications were sent in at different dates. But the King recites his "Désir le plus sincère que *le corps helvétique* conserve son état actuel de souveraineté absolue et de parfaite indépendance." Inconsistently, he engages—"au cas que ledit corps, *ou quelques-uns des états et républiques* qui le composent, fussent attaqués par quelque puissance étrangère, S.M. les aidera de ses forces. . . ."<sup>4</sup>

The Helvetic Republic of 1798 was a unitary democracy—and by the Napoleonic constitution of 1803, the several states were deprived of the power of contracting foreign alliances. But these were artificial creations, and perhaps the constitution of 1815 was no less so. Under the latter, alliances prejudicial to the Union or any canton were prohibited, but a sort of suspended international sovereignty remained to the different members of the Confederation. In 1848, the Sonderbund War virtually sealed the fate of cantonal independence.

The connection of Britain and Hanover from 1713-1837 presents many of the features of a federation. It is here again very difficult indeed to say whether the

<sup>1</sup> See Dumont, V. i. 459; V. ii. 38; VI. i. 63.      <sup>2</sup> *Ib.* VI. i. 18.

<sup>3</sup> De Martens, *Recueil*, II. 507.      <sup>4</sup> *Ib.*

dominions of George III. formed one country in the eyes of the Continent, or two. But it is more than probable that they were regarded as one. The peculiar position of Hanover, an Electoral State of the Holy Roman Empire, necessarily tended to preserve its separate existence. But it was not impossible and hardly unusual that a single ruler should have part of his dominions within the Empire and part without. Hanover entertained no separate relations with foreign courts.<sup>1</sup>

The United Provinces of the Netherlands, at the inception of their union, clearly intended federation. But the several provinces took no pains to enter into relations as sovereigns with foreign nations, and the Netherlands became to all intents and purposes a unit of international relations. It can hardly be supposed that at any date Zeeland, Friesland and Gelderland counted among the Powers of Europe.

Under the Union of Utrecht (1579) <sup>a</sup> a permanent and indissoluble confederation was established. The seven provinces were united—"comme si toutes ne fussent qu'une province seule—(*in alle forme ende manieren als ost syluyden maer een provincie waren*)—sans qu'elles se puissent en nul temps à l'advenir, désunir ni séparer, ni par testament, codicille, donation, cession, échange, vendition, traittez de paix ou de mariage, ni pour nulle autre occasion que ce soit, ou puisse estre." Each province reserved its local privileges, but as the theoretical sovereignty of the Empire was maintained, it might have been difficult to say precisely what were the respective international positions of the Provinces and the Union respectively. Article 10 does not conclude the point—"Que nulle desdites provinces, villes ou membres, ne pourront faire aucune confédération ou alliances avec

<sup>1</sup> The Hanoverian Government, in 1831, corresponded with that of Portugal through the British Foreign Office (18 S.P. 332, Ompbeda to Palmerston, 15 Sept. 1831).

<sup>a</sup> Dumont, V. i. 323.

nuls seigneurs ou pays de leur voisinage, sans consentement de ces provinces-unies, et de leurs confédérés." It left it open to the provinces to conclude treaties, and to maintain relations, with foreign powers, so long as they did not amount to alliances.

Temple in 1668 still calls the Netherlands a confederacy of seven sovereign provinces. But a common Stadtholder and a common States-General had made this sovereignty illusory for external purposes—if not implicitly for all internal ones as well—by that time. Although the consent of each province might constitutionally be necessary to the waging of war, foreign statesmen thought of the Netherlands as a unit and as a whole. Temple notes that on one occasion<sup>1</sup> he secured the consent of the States-General to three treaties without complying with the form of obtaining the concurrence of the provinces and free cities; which clearly proves the constitutional and subordinate nature of their sovereignty. The provinces gave a subsequent assent: but that was only to relieve the members of the States-General from municipal penalties. It did not invalidate the treaties. In fact, the States-General are treated as the sovereign of the country in all the treaties of the time. For example, in the French Treaty of 1644, Art. 6 uses the phrase—"Le roy et lesdits sieurs Etat-Généraux venant à conclure une paix ou une trêve, . . ." <sup>2</sup>

The French invasions of 1672 and 1747 precipitated the unity of Holland by settling practically unlimited power in the person of the Stadtholder. At the time of the Armed Neutrality four of the states were in favour of that alliance, and three against. This division of opinion did not hinder the accession of the country to the league.

<sup>1</sup> *Observations on the United Provinces*, p. 36. But this consent of the States-General, subject to ratification, seems to have been nothing extraordinary.

<sup>2</sup> Dumont, *loc. cit.* VI. i. 295.

At first treaties were occasionally ratified by the separate provinces : e.g. the treaties of 1608 with James I.<sup>1</sup> But this seems only Scottish caution : see the Danish treaty of 1621,<sup>2</sup> the Brandenburg of 1605 and 1624,<sup>3</sup> Swedish of 1614,<sup>4</sup> and even the British of 1625,<sup>5</sup> *etc.* When the Duke d'Alençon was elected to the chief magistracy, in 1580,<sup>6</sup> he agreed to take the oath in each province, as well as the oath to the States-General, but this of course was matter of constitutional order. When William of Hesse invaded East Friesland, that province was empowered by the States-General to enter into a treaty with him to regulate the support and behaviour of the Hessian troops.<sup>7</sup> The central authority were parties to the treaty, which therefore seems little more than such a contract as the Corporation of Dover might to-day make for the supply of paving-stones with a foreign government.

A less certain verdict must be pronounced on the early status of the provinces of North America. Isolated from Europe by geographical position and by settled policy, it might perhaps have been possible to the States to assert their international existence, though debarred from direct foreign relations. The Civil War demonstrated that in 1861 the possibility no longer existed. "State rights" must, since that conflict, be constitutional rights and not international ones. So far as the rest of the world is concerned, forty-two states may wipe out the forty-third without comment. Their "internal" federalism, like the Swiss, unlike the Dutch, has not been without the stress of violence, due to the artificiality and legalism of its framework. It was too close a union for such diverse ideals as those of Louisiana and Massachusetts. The reason why the United States of North America, which were undoubtedly meant to

<sup>1</sup> Dumont, *loc. cit.* V. ii. 94, 635.

<sup>2</sup> *Ib.* 399.

<sup>3</sup> *Ib.* 53, 465.

<sup>4</sup> *Ib.* 245, 249.

<sup>5</sup> *Ib.* 479, 482.

<sup>6</sup> *Ib.* i. 390.

<sup>7</sup> *Ib.* VI i. 149.

appear as a true federation of true states, have become a single unit to the outside world is not at first sight apparent. The events of 1862 set the seal on this unity, but they did not create it. And the explanation which suggests itself is this:—that its germ was sown when geographical expressions were admitted into the Union on the footing of states. Before that, there had been reality. Georgia was conscious of itself: Virginia was: Rhode Island was: Pennsylvania was. But when the fantastic territories of the West, oblong sections of a surveyor's map, without separate history, cohesion or traditions, were incorporated into the federal union on a basis of population, the knell of Hamilton's conception had struck: the Union had become a unit. The devotion of the common man in Minnesota or in Ohio was not to Ohio or to Minnesota. It could not be. Ordinary people are not fanciful, if they are sentimental. The United States, as a unit, alone filled the perspective. The reaction on the Atlantic seaboard of the growing and energetic West was inevitable. The conception of a state was reduced to the lowest terms; and just as the creation of life peers by the hundred would reduce the status of the peerage, so the creation of amorphous states degraded the conception of statehood, until with the advent of the Ohio President, Lincoln, the crash came.

Incidentally, mention should be made of the signal danger which resides in what may be called "attorneys' constitutions": constitutions of elaborate draftsmanship, designed to supply the want of national sentiment by precise verbiage. Words can never be entirely free from ambiguity. The attempt to express finally in black and white the relations of federated states proves only that the first requisite of federalism—a vital conviction of the fit limits of central and local power—does not exist. That it should be possible to argue whether or not the constitution, where it invests the federal

legislature with the sole power of regulating inter-state trade, means to invest it with a power of regulating anything and everything connected with it, is a melancholy proof of the substitution of quibbling for statesmanship which such a state of things effects.

China, on the contrary, presents us with an example of federation which, were it not so little known, might almost be called the standard example. For not only centuries, but ages, the Celestial Empire has been effectively organized on a federal basis. The ancient military empire decayed: feudalism followed, and then the great vassals exchanged vassalage for independence, and inaugurated the *chan-kuo* or federal *régime*.<sup>1</sup> It has suited Western powers to deal with the Emperor at Peking, and to regard the local authorities as subject to his complete control. Half the complications which have arisen in the history of European intercourse with China have been due to the fact that its federal structure was imperfectly recognized. Nevertheless it secured to the country unbroken peace, and a combination of elasticity and toughness that has carried its rulers successfully through crises which would have dissolved a kingdom whose brain was centred in the single nerve of a despotic cabinet. A federation is not paralyzed by a crushing blow at its capital. Its organization is independent of its central authority, and it is no more possible to kill it than the Lernean hydra at one stroke. The centre of consciousness only shifts elsewhere when the highest head is cleft. Thus Kossuth wrote from Debreczin in 1849—"Our nation still exists! The surrender of the capital has no effect on its vitality, for our municipal institutions have now, as throughout all history, asserted their vitality."

<sup>1</sup> See an interesting article "International Law in China," by W. A. P. Martin, *Rev. de D. I.* (1882), 227. Mr. Martin finds under the *chan-kuo* traces of embassies, treaties, balanced power and neutrality, among the twelve leading states.

Tycoon Japan was rather feudal than federal. Properly speaking, the latter term is wide enough to comprehend the former. To avoid embarking on the tangled theme of the Middle Ages, it is best to disembarass ourselves of its discussion. And the feudalism of Japan was feudalism reduced to a vanishing point, for sub-infeudation does not appear to have been carried far, and the supremacy of the Tenno and of the Tycoon ruling in his name was not limited by any legal bounds. At the same time, the power of the five hundred daimios was immense. From the date of the Tokugawa Iyeyasu, their power and splendour made Japan very like a federation. It cannot, however, be called an instance of the failure of federalism, when the era of Meiji was inaugurated. The daimios, if great and magnificent, were not only in theory but in thought the subjects of the Tenno. That might not much have mattered if the Tenno had consistently left them alone. But the heavy hand of the Tycoon was everywhere.

The peasants, says Hartshorne, had their own assemblies and their own magistrates chosen by themselves; and under the laws of the province (*kuni*) they practically governed themselves in all matters of local interest. In de la Mazelière's opinion, the Japanese countryman, "secure against eviction, yet not allowed to enrich himself, showed neither zeal for his work nor desire to improve his methods of culture. In good seasons he thought only of drinking, pilgrimages and festivals; in times of scarcity he resigned himself, with Oriental fatalism, to misery and death which often he might have avoided."

Feudalism in Japan, in the last-named author's view, was a kind of compromise between the territorial feudalism of Europe and the clan system which it seems to have superseded. It was territorial, but instead of the relation of lord and man which superseded that relationship in Europe, there was the old clan relationship of kin.



The land system of Japan, brightly as its history illuminates our own, must not detain us here.<sup>1</sup>

The system of government in the Malay Peninsula was one of a network of semi-independent rājās under a chief—the whole population under each such chief being only a few thousand. Inland from Selangor lay the interesting federation of Negri Sembilan, or the Seven States. Under the presidency of the Iam Tuan, the chiefs of these tiny states formed a central council, under which the villages of the district enjoyed a prolonged and prosperous peace. Far longer than the more absolutist Pérāk and Selangor, the Negri Sembilan resisted foreign influence. "Where the needle goes, the thread will follow," said the wary notables, and declined the kind offer of a Resident.<sup>1</sup> Now they have the blessings of thirty new statutes per annum on the best Singapore pattern, which it is to be hoped they understand, for it is more than one humble commentator does.

Reverting to Japan, let it be noted how strongly the principle of communal solidarity is affirmed. Lord Iozan of Ionezawa, in Tokugawa times, proclaimed:—

"The cultivator's mission is in agriculture and sericulture. Diligent in these, he provides for his family, and gives his dues to the government in return for its protection. But all this is possible only by mutual dependence of one upon another, for which purpose

<sup>1</sup> Since the Taikwa reforms of the eighth century, all land, as in England, in theory belonged to the Crown. Grants to private persons were resumable in six years. In practice they tended to become, like our copyholds, first life interests and then estates in fee: and not inalienable. The provincial governors, nominally appointed for ability, became hereditary officers, like the Sheriff of Westmorland; and these became the daimios of later times. Waste lands could be granted out for special services, either by the crown or by the daimios. There was a land tax of  $4\frac{1}{2}$  per cent.: a ten days' *corvée*: and a tithe tax on industrial products.

<sup>1</sup> See *Law Magazine and Review*, Vol. 26 (1901), 312, 407.

associations of some kind are necessary, and we hereby institute anew the Companies of Five and Ten and the Company of Five Villages, as follows :—

“ The members of the Company (*kumi*) of Five should be in constant intercourse with one another, and divide the joys and sorrows of each, as do the members of one and the same family. The members of the Company of Ten (householders) should have frequent intercourse with one another, and listen to the family affairs of each, as do they who are of kin. They of one village (*mura*) should be like friends in helping and serving one another. The villages which constitute the Company of Five Villages should help one another in time of distress as befits true neighbours.

“ If there is one among you who is old and has no child, or is young and has no parents, or is poor and cannot adopt sons, or is widowed, or is a cripple and cannot support himself, or is sick and has no means of help, or is dead and left without burial, or has not fire and is exposed to rain and dew, or by other calamities his family is in distress—let any such who has no one else to depend upon be taken up by his Company of Five, and be cared for as its own. In case it lies not in the said Company’s power to succour him, let his Company of Ten lend him its help. If his case need more than the latter can do, let his village see to it. Should some calamity overtake one village, so that its existence is endangered thereby, the four of the Company of Five Villages should give it willing salvation.

“ If there is one who neglects his farm, or follows not his calling, and runs to other employment, or indulges in banquets, theatres or other laxities, such should have the peremptory admonition, first of his Council of Five, and then of Ten, and in case he is still refractory, he should be privately reported to the village authorities and receive due treatment.”<sup>1</sup>

And the Gold Coast of Africa knows a not dissimilar system.

We turn back to the one standard example of permanent and familiar federalism—the Germanic Empire.

<sup>1</sup> Hartshorne, *Japan*, II. 78.

Based on feudalism and religion, the Empire had to adapt itself in the sixteenth and seventeenth centuries to individualism and religious schism. It is a commonplace to dwell on its failure, and on its phantasmal after-career. Less than justice is done by this summary judgment. From 1648 to 1848 the German Empire and the Germanic Confederation gave Germany the possibility of ordered peace. Frederic II. of Prussia is virtually the sole example of a monarch who defied its organization. One has only to reflect on the hundred and thirty-four sovereign princes and cities who during most of its career composed it, to realize what a tremendous force for good was the consolidating Empire. Far from being dead or moribund, the great Federation lived to shelter under its wings the multitudinous centres of life and development which made Germany the seed-plot of thought and placed on her brows the crown of music—the one art in which the modern world is supreme.

There are thinkers who turn away in sadness from the picture of this Germany. Divided and numbered, delivered over to a hundred and thirty-four courts, they see her condemned to deadly dullness and impotence : politics a court intrigue, commerce a court toy. They fail to see further than the surface. Beneath the veneer of dull ceremonial, the individual life of localities was nourishing and stimulating genius which, so far, has not been the mark of Centralized Germany. The flame-clear spirit of Kant—the colossal grandeur of Bach—the penetrating grasp of Leibnitz—the delicate taste of Winckelmann—nay, the patriotic intensity of Körner, and the patient statecraft of Hardenberg—were the products of this dismal nadir of the politician's fancy. And we can close the list with the names of Hegel and Wagner. Are Strauss and Nietzsche improvements ?

Centralized Germany, in the opinion of some, is a Germany which is decaying at the heart. Old lofty

ideals, old chivalric sentiments, are withering. The German of the past, with the plain straight mind and practical downright ways, and yet with such a deep, soft vein of romantic sensibility and emotion, is, they tell us, disappearing. Is it merely a coincidence that he flourished better in the days when home rather than empire was the watchword of the race?

Certainly—though a similar transformation of ideals may be noted in England and America—the misgivings may have some semblance of truth. Since Bismark's triumph, there has been a note of hardness and of materialism in Germany which was not apparent before. Far may it be from us to say that Germany no longer occupies herself with unselfish ideals, and with gracious observances. No one who knows her will say that. But it is not to be disputed that their ground is less secure than it was in the early days.

May it be possible that in a return to the ampler local life of the old confederations, avoiding their faults, Germany may find a priceless spiritual gift? As Antæus, touching Earth, derived new strength and freshness, so a nation which condescends to come to close quarters with localities, will draw from them a perennial supply of that vitality which comes to its children from their local homes. The signs are visible that Bavaria and the southern states are not content. A more generous federalism is the clamant need of the Empire. The present Prusso-federalism is not based on reality. It will be one more of the "failures of Federalism."

Indeed, it is difficult to say whether or not the federation leaves the single states with any international existence. Is there a Prussia to-day, in the sense in which there was a Prussia in 1854? Is there a Hesse-Darmstadt?—or a Würtemberg?; except as provinces of a Germany?

One great reason for holding that there is, lies in the fact that three States—Bavaria, Saxony and Würtemberg

—entertain foreign diplomatic representatives. Their reflected glory may be cast upon all the rest. It is maintained by some that the reception of these personal envoys, sent to the local German courts mainly (if not entirely) on account of family relationships, does not and cannot affect their status. The answer is clear. It is of no consequence what functions are in fact fulfilled by an ambassador. If he simply sits still in his armchair and smokes cigarettes, the very fact of his being received is *primâ facie* notice of the existence of an international power which receives him. States cannot be allowed to discriminate, and to declare as suits themselves what are, and what are not, proper ambassadorial functions. The minor German states have, by keeping up, on whatever pretext, diplomatic relations, taken a long step in the direction of preserving themselves from extinction.

The German states, therefore, seem still to exist, though precariously. Consequently even the present Prussian Empire is a true federation of internationally sovereign states. As the Confederations of 1804–1870 erred by excess of looseness, it errs by excess of strictness. It needs no prophet to see that modifications will be necessary at no distant date.

Those earlier forms of confederation which subsisted from 1804 to 1848 and from 1848 to 1870 need no special investigation here. They were quite clearly real federations of genuine states. They carried on the splendid tradition of sovereignty controlled by obvious law, which had been handed down from the mediæval Empire, and had been nearly extinguished by the political theories and the religious necessities of a stormy century and a half.

Disparage as we may the German Imperial system as it existed after the Peace of Westphalia, two facts, one patent, the other less obvious, stand out in relief, to be placed to its lasting credit. It gave comparative peace and quiet and a richly varied development to Germany ;

and it gave its present jural character to the Law of Nations. If one peruses the *Jus Belli ac Pacis* of Grotius and the work of his forerunners and contemporaries, on turning to the writings of Möser one becomes aware of a difference which can only be ascribed to the influence of a new atmosphere of curial justice and submission to law. In the older authors, one reads pages of vague ethics and chapters inculcating counsels of perfection and imperfect duties. One listens with delight to scriptural parallels and classical illustrations. One admires and follows at a distance. The inspired teacher scales heights which leave the humble monarch—a Gustavus or a Frederick—panting and breathless in the rear. The great Germans such as Rachel and Möser come down to earth. Their system is practical and imperative. They view the monarch as bound to his fellows by a very definite network of rights and duties. Their ideas, in short, are the ideas of jurists familiar with the daily practice of the Aulic Council. They treat the controversies of states as they might be treated in that high tribunal. There may cling about their work some of the mustiness of forensic debate. It misses the serene loftiness and the ample range of their predecessors. But it definitely stamps the Law of Nations as a system of law and not a system of ethics. Modern International Law, as Jefferson expounded it and as Nesselrode understood it, is a magnified image of the Law of the Germanic Empire.

Federalism, then, has not on the whole had a fair chance. It requires for success a comparatively delicate adjustment which it has not entered into most people's minds to consider. The efforts of federalists have oscillated violently between producing a system of strict union, tempered by elaborate paper limitations, and a loose arrangement for preventing internecine war between cousins-german.

The examples of China and Germany are, at the same time, not discouraging. A system of great perfection

must necessarily be slow of evolution. From the specific faults alleged to be inherent in it, federalism is at all events free. They arise from the failure of statesmen to realize that federalism is not a ready-made nostrum, but that it must be carefully adjusted in each particular case to fulfil and not to cramp or fail to satisfy natural feeling.

Let it be reiterated that the root of national feeling is a vivid local patriotism. That, in any satisfactory polity under present conditions, must be the dominant principle. Then, to secure common action within definite limits, common principles of right within wider limits, there must be federations, and federations of federations, each with functions of a known extent which is not seriously questioned or questionable without altering the whole mental attitude of the population concerned. That the world is ready to accept federations based on one or two such simple postulates, such as the permanent value of peace and territorial independence, is scarcely to be doubted. But there is a grave danger in the schemes which are now so actively propounded for World-Federation.

Because our national sovereignties preserve internal peace and do rough justice within their dominions, the unthinking cry is raised for a world-sovereignty of the same imperfect type. The dulness of the idea is manifest. It is precisely this crude absolutism of the legislatures, of the autocrats, of the bureaucratic cliques, of the chance majorities, that thinkers in every land are endeavouring to destroy. The unchecked power of the House of Commons—(with occasional bursts of independence on the part of the Lords)—in Britain : the unchecked power of autocracy in Russia : the virtual freedom from effective restraint of government in Europe generally, are all matters which are seen by every one to involve dangers of extreme seriousness.

As Mr. Frédéric Passy declared the other day in the Senate—"Parliamentary omnipotence is making liberty extinct in France." It is assuredly not a fortunate

time to copy the crudities of absolute legislatures and privileged officialism in the sphere of international relations. They are being abandoned in the sphere from which they are copied, and we may as well copy the improved edition.

The first requisite, then, is the satisfaction of local patriotism: the next, the avoidance of a Universal Provider of legislation and police; and the third, the skilful introduction of federal machinery for giving expression to the limited but important needs of wider areas than these small units of force.

In particular, the wider unions cannot be in any sense nations. The flame of patriotism, if it is not a flickering flash of summer lightning, must burn steadily in one place. The Unions must claim compliance; they cannot demand allegiance. So all-important is local attachment, and supreme, that those examples of patriotism which we are accustomed to consider lofty and almost exaggerated, are in reality pure cases of local patriotism. I do not venture to speak of Japan, but the most conspicuous nation in Europe for intensity of patriotism is probably Hungary, and Hungarian patriotism is local patriotism *in excelsis*. Hungarians themselves recognize it. "I am a patriotic native of Budapesth!" an accomplished Magyar lawyer observed to the author, in answer to a tentative question. "I have lived all my life here, and I know it by heart." "The patriotism of the Hungarian," says a writer, "I suspect is a reflection of his intense passion for his native town. No town in the world is anything to compare, in his eyes, with his own." It is the only real basis of state life. The patriots of antiquity were city-patriots. The Poles, that other great tragic race of Europe, were so fiercely wedded to local independence as to uphold the *liberum veto* of local magnates.

We may discard the repeated declamation of politicians who impress upon their hearers the possibility and propriety of double allegiance. It is a platform commonplace



for an orator to talk of the pride which a Scotsman feels in Scotland as being perfectly compatible with his greater pride in the British Empire. It is a gratuitous assumption. No one is capable of two supreme passions. The federal union may be the subject of warm interest ; of great approval ; of disinterested sacrifice. But the *patria* remains in unassailable supremacy. Put before an Imperialist Scot the choice of the Union Jack or the red lilies and lion, and if he has not forgotten Scotland altogether, there will be no hesitation in his choice. Even the name of Scotland stands in his mind for the piece of Scotland he best knows and loves. Federation does not need an impossible devotion to two rulers, any more than feudalism demands an impossible devotion to seventeen lords.

How to bring about a living federalism which shall embrace the world, is a larger question, which we do not presume to discuss in detail. But at least it is incumbent on us to indicate the manner in which it is possible. These dreams of city-states and hierarchies of power are remote enough from the facts of the present-day world. How can they be related to them ? The answer is that the necessity for them lies in the thought of to-day. If the life of myriads at the moment is monotonous and depressing : if powers are wasted in Paris and London which ought to hold sway over far villages of Wales and Provence : if, for want of friendly guidance and help, masses of pauperism are accumulating in the vortex of society : if in the higher ranks every man is a social Ishmael, or at best a Hal o' th' Wynd, fighting for his own hand, with his eye on a motor, or a coronet : if power has become divorced from grace, and presses with a dull mechanical uniformity alike on the just and on the unjust : if the exercise of personal sympathy in administrative details has been replaced by the indiscriminate stiffness of official pedantry : if life has become a great game of blindman's buff, then nothing is more certain than that

the commune will ultimately vindicate its lost liberties. Neighbours cannot remain strangers. They will pit their self-conscious strength against the ignorant dulness of state routine. The vital organism, based on good understanding, will eat away the dead timbers of the state machine. So Daireaux wrote in 1886—"Le principe des nationalités, qui a bouleversé le monde, qui a triomphé d'armées puissantes, ne triomphera jamais de ce vieux germe de localisme qui est au fond du cœur de tous les hommes."<sup>1</sup>

At the other end of the scale, while these knots of neighbours are developing corporate life, the efforts of the advocates of peace and arbitration will have developed the simple form of federal union which is calculated to unite all the world. The state in its present form will dissolve easily and naturally, and its powers will be beneficently scattered into hands which can effectively use them. The giant Leviathan will vanish, and humanity will rule.

As the local groups—which will by no means probably be town councils, or anything in the least resembling them—rise in influence, they will assume the bulk of his power. A fraction will fall to the Federal Union. A portion, not inconsiderable, will vanish with the giant into smoke. We may feel a modest confidence that the future age will disclaim omnipotence; even of the theoretical variety.

The stratification dealt with in the last chapter will act as a powerful lever in breaking up the old system. So long as the race is pleased with its new mechanical toys, and is content to talk to wires and to look at pictures, local contiguity may go for little. The organization of the world by classes may diminish the pressure of social evils, and thus retard for hundreds of years the adoption of any but a rudimentary federal polity. But, sooner or later, the probabilities are that society will

<sup>1</sup> Clunet, 13 *Journal de D. I. Pr.* 288.

crystallize on the old formula of local union. And if it is not to prove to be an organization of a lower type than was exhibited in the mediæval time, it must be federal.

Meanwhile, the slender federalism which is possible can only be realized by the most cautious adjustment to the demands of public feeling. Nor must too much be inferred from the vapourings of enthusiasts, the schemes of politicians, or the frolics of the Fourth Estate. The imposition of a common judiciary we have deprecated in Chapter I. The imposition of a common legislature would have even more immediate evil results. Those who dream of a United States of the World, forgetting that the United States of America are divided from each other by no ancient memories, would dethrone science and reason and would substitute for their sway the brute force of arbitrary dogma and parliamentary majorities.

Between nations there has hitherto prevailed a law which—broken sometimes, as all law must be, but never suspended by the arbitrary decree of monarch, parliament or president—is no more capable of being so suspended than is the precession of the equinoxes.

Speaking of this unique and admirable characteristic of International Law, Phillimore (IV. § xi.) says :

“ It is a matter for rejoicing that it has escaped the Procrustean treatment of positive legislation and has been allowed to grow to its fair proportions under the influence of that science which works out of conscience, reason and experience the great problem of Law, or civil justice.”

Parliament can decree injustice by a law. Science and conscience cannot. Are those wise who ask us to abandon the rule of law grounded in the universal sense of right for the capricious tyranny of ministers controlling the legislative machine ?

## CHAPTER IX

### THE ASSOCIATION-STATE

BUT federalism will not be the end ; nor even, perhaps, the necessary development. In the chapter on Stratification, we touched upon the tendency to ignore the organization based upon territorial areas altogether, and to substitute some other principle of cohesion.

" In the chill of this grey dawn," as an eloquent writer says, we may well feel that we are invited to contemplate the passing of old things to an alarming extent. There may be felt some repugnance to concern ourselves with a state of affairs so remote in standpoint, perhaps so remote in time. Nevertheless, it is not into an unscanned vista that we ask our readers to look.

The ideal of the future to which thought and action are painfully working their way is that of organization based upon voluntary association.

Local connection is after all an arbitrary thing. For the present, and for long enough to come, local association and cohesion must be of capital importance. But the class cohesion, which, as we have seen, bids fair to overshadow it, at all events for a time, is the symptom of revolt against its arbitrary and essentially accidental character. The explosion of the Renaissance drove the elements of population in flying drops of spray far and wide. Fresh political elements came into being to meet the changed conditions. The modern explosion, now to all appearance preparing, will have a still more startling diffusive effect in proportion as the means of

travel and communication are greater. The boundaries of national feeling will be broken down, and the organization on a basis of mutual good-understanding will have begun. The organization would begin as a simple necessity. To combat the forces of organized and insistent manualism, the holders of capital will naturally and inevitably gather into focus their international resources. At first secret and unofficial, the power (whatever form it takes) that disposes of these resources will ultimately attract to itself political power, and its finger will penetrate to every corner of the world. The process will be quite organic and natural. At no point will anything startling happen. The old parliaments and cabinets will, if history is any guide, continue to exist. Their functions will gradually atrophize, until no one any longer thinks it worth while to call them together. For not only will capital have solidified itself into a fighting caste : but so will manualism, and many another interest. Capital will have a start in the race for supremacy. It is easier for a few to combine than for many. Moreover, the capitalist knows foreigners better than the workman ; and, on the whole, he has very much less prejudice against them. But it is not likely to be all-powerful.

If, eventually, a complex federal polity supervenes upon this welter of castes, owing to knots of neighbours resenting the wholesale uniformity which the castes, no less than the out-worn states, would in the end impose, it will be because the inveterate habit of neighbourliness is still too deeply rooted in the race to admit of an immediate further step in the direction of voluntarism. But, with or without such an intervening period of complex federalism, it seems safe to hold that the ultimate issue will be organization on a footing of free choice. Accident will be recognized as a weak ground on which to base union. Accident of birth or of residence—it will not matter.

The victory of voluntarism would eventually come

about by a process of survival of the fittest. When it is seen that a company of individuals, joined together from free choice and affection, have a strength that no mere fortuitous assemblage possesses, the triumph of the principle will be assured. Such a union is that of which Ruskin spoke when, extolling the "principle of co-operation," he pointed to the handful of slime, separated into its constituent parts and turning into a diamond, a ruby and an opal, set in a "star of snow."

It is the random socialist who would grind carbon, silica, corundum and damp together in a "brotherly" mass of mud.

The voluntarist sets each atom free to organize with its like in the way agreeable to its nature. Only so can its best qualities be brought out. Our natures are so diverse, and it is so little we can know of each other, that it can only be within the most jealously limited sphere, and with the utmost caution, that any one should presume to dictate to another. Much less should a living being be set under the dominion of dead rules. Not enforced collectivism, but what Sir N. Nathan<sup>1</sup> condenses in a word as the "systematisation of altruism" is the hope of the coming ages.

A germ and promise of the Association-State of the far future exists in the extraordinary development of societies and leagues for all human—and some inhuman—purposes. From churches to chess clubs, voluntary societies, the entrance to which is compulsory on no one, and which rest for their existence absolutely on free enthusiasm, form a feature of modern life which in one aspect is wholly new. It is not only that they are numerous and important; the real significance of them is that they are universal. Scarcely an individual above the submerged limit who does not belong to two or three: be they only recreation clubs and blanket unions. And a good deal of light might be thrown on the subject

<sup>1</sup> *Economic Heresies.*

by the history of China, honeycombed as it is with societies of the first political importance.

There are even now societies, which, condemn and dislike their objects as one may, have clearly transcended national limits by explicitly disclaiming national authority. It is useless to deny the attractive power of their propaganda, nor the enormous influence which those who direct it can exercise on the world. Forced union accumulates material resources: free union accumulates spiritual resources. Forced union piles up material strength, as a giant piles up flesh—but there underlie it all the giant's feeble muscle and feebler brain. In free union the will and desire and the whole mental force of the individual are utilized to the full. The result can only be to give it an incalculable advantage. "One volunteer is worth ten pressed men."

It is safe to predict that the advantages of voluntary and close union will not long be left to the anarchists as their exclusive monopoly. The numerous societies which exist for isolated political objects are of little importance in themselves, for they do not affect to be intimate and exclusive. They demonstrate the value of even a little combination—but it is only when persons, realizing a common ideal as of transcendent importance, receive one another into the closest intimacy because of it, that their union becomes a real rival to the state. The force of companionship in the maintenance of unrecognized ideals is not always properly estimated. The paradox is realized that, in that companionship, pain is pleasure. The individual would rather follow the rest through the dark places than not. This is scarcely appreciated by those excellent persons who would preach to the Indians the benefits of alien rule, with laments that they should agitate against their benefactors. They forget that the agitators uphold an Ideal, and that, with that in the distance, it is more attractive to follow them into prison, than to remain under the Britannic vine and fig-tree. Not other-

wise did the Davidsbündler haunt the rocks of Moab and the deserts of Ammon. It was pleasanter to go with the rest, than to remain at ease in Jerusalem.

So, the Austrian boasts of the public works he has carried out in Bosnia: of the roads he has engineered, of the buildings he has set up. He has indeed done much, and when he asks of the Bosnian, in return, to renounce his racial aspirations, he asks precisely what the Englishman asks of the Indian. And the Englishman is grieved at the callousness of Vienna, and the Vienna people lecture the Bosnian on his ingratitude. But the Ideal is before the Bosnian.

It is a commonplace that this force is the mainspring of that great cross-stratum of society—the Christian religion. It is not a doctrine or any theory that is the essence of that religion; it is devotion to the ideal person of Christ. In the company of Christ and the Saints a Christian entirely welcomed contumely and pain. After the era of forced conversions, the supply of saints and martyrs becomes—unreliable. Mysticism is the heart of religion, as it is the heart of love. Every time that the mind pierces through appearances and discerns a living spirit through the vesture of changing impressions, it performs an act of mystic contemplation. Mysticism is no “morbid condition of the nerve-centres,” it is the normal condition of life. The child grows in mysticism as it grows in stature. As it learns to infer from the changeful shapes around its cushions the unsuspected hidden principles which it grows to know as persons, its mystical education progresses, until it becomes the adept of two years old. The man in the street is a mystic when he meets a friend.

The more mystical and ideal a union may be, the closer and the more tenacious it is. But without approaching the perfection of an agapemone, a union of a quite terrestrial character may be exceedingly close and enthusiastic. An army of lovers, says Plato, would be irresistible. When they become conscious of their mystic unity, those



who think alike cannot fail to act in concert and to prevail. And there is this great advantage in a society based on voluntary organization : that the best elements are the most readily organized. There is honour among thieves ; but there is not much. Harmonious co-operation is the prerogative of sympathy and affection.

It was observed that the conception of society as arranged on such a satisfactory basis is not a novel one. In such an unexpected place as the writings of Ibn Khaldoun,<sup>1</sup> the Saracenic jurist of Tunis, it appears quite clearly. Ibn Khaldoun begins by pointing out the two grand divisions of political systems, the religious polity, which invokes religious penalties and depends on divine authority, and the business polity, which is based on considerations of mundane profit and loss alone—and then proceeds to remind his readers that there are those who entertain a different social ideal altogether ; who oppose to the *civitas imperfecta*, the *civitas perfecta*. In that perfect state, formal relations are based on sympathy : there are no litigations, nor need of any sovereign, but the eyes of the citizens are set in the same direction, to follow the Inward Light which is common to them all.

Al-Farabi, too, the court-philosopher of Bagdad, is quoted by Nys as having grasped the same conception. He talks of “ those chosen minds which live like foreigners in the land where they dwell, the social life of which is out of harmony with their ideals.” And the greater name of Avempace<sup>2</sup> can be adduced. “ In the ‘ perfect ’ State, every individual will attain the highest development of which humanity is susceptible ; every one will conceive of it in the most fitting manner ; no one will dwell in ignorance of what the laws and customs really are : there will be no laxity or trickery in conduct. Thus litigation—‘ the surgery of souls ’—will be uncalled-for.”<sup>3</sup> Even

<sup>1</sup> Cited, Nys, *Rev. de D.I.* (1901), 418.

<sup>2</sup> Born at Saragossa, *circa*. 1100 A.D.

<sup>3</sup> Cited, Nys, *ut sup.* : freely translated here.

in the "imperfect" states of the day, there are chosen spirits: the "*solitaires*," who are putting forth "organic filaments" (in Carlyle's phrase) of the "perfect" state of the future and struggling to become its elements; the so-styled "shoots," called so on account of their likeness to the plants which shoot up spontaneously and by nature, in the midst of their artificially cultivated species. These are they whom the Sûfis call "foreigners," for through their mental attitude they are in a way strangers in their family and foreigners in the social world which surrounds them, and by virtue of their mode of thought they pass into the ideal communities which may not unfairly be called their true homes.

These airy speculations of the Arab doctors are no doubt intensely ideal. Their Perfect State lies some way beyond the Association-State which the modern devotion to contract and human freedom would seem to demand. But the root-idea of a union based on mutual sympathy and understanding is the same. Association is induced by sympathy, and whether the sympathy be as penetrative as that postulated by the Southern thinkers, or remain only a limited enthusiasm, the principle remains intact. Union based on mutual understanding and free consent is a thing to be reckoned with by the most modern publicists.

"It is certain," says Mr. Jenks,<sup>1</sup> summing up the results of his brilliant investigation of the general course of European history, "that the notion of Contract has made serious inroads upon the older ideas of Law and Politics; few thinkers can doubt that it is destined to play a yet greater part in social history. There are already signs that it is regarded with fear and dislike by older institutions; and even the most advanced advocates of change are found to look with suspicion upon it, as an instrument capable of wounding the hand which uses it. But that, in some form or another, it will come into

<sup>1</sup> *Law and Politics in the Middle Ages*, p. 316.

conflict with the military notions upon which the great majority of states are still founded, is tolerably certain."

"We look, for the future of Contract, not to the Gentile organization of the clan, nor to the military organization of the State, but to some as yet undeveloped institution, which shall supersede them both."<sup>1</sup> And Mr. Clunet shows, not obscurely, how the victory of Contract is the victory of free Association.<sup>2</sup>

Attempts to recast society by mechanical means are sure to be baulked ultimately. Treaties, Acts of Parliament, Federal Constitutions, Declarations of Independence, resemble attempts to make a solution crystallize on predetermined lines, and they are equally predestined to failure. Crystallization must begin with the atom. And the atom will only group with its fellow-atoms, in the pattern marked out by its nature.

It is not by inventing arbitrary rules of union that society can be induced to crystallize, but by encouraging the natural affinities of its individual members. That cannot be done from without, by a legislative act. It would be as reasonable to try to mould the nascent crystals of silicate of copper with the fingers. Such interference can retard union: and there its capacity ends.

<sup>1</sup> *Law and Politics in the Middle Ages*, p. 292.

<sup>2</sup> *Les Associations* (Paris, 1909).

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